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CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, a political subdivision of the State of Arizona; THOMAS J. CASTILLO, EVA BACAL, THOMAS WRIGHT, LAURA ALMQUIST, RAUL GRIJALVA, MERRILL GRANT, in their capacities as members of the School Board TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

CATHERINE M. McCRACKEN
BUSBY, McCRACKEN & BELL, P.C.
1241 East Prince Road
Tucson, Arizona 85719
(602) 293-0344

148 pp

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Arizona Court of Appeals erred in upholding the trial court's decision that the 1986 Amendment to the Age Discrimination in Employment Act (ADEA) removing the maximum age cap to the Act and abolishing mandatory retirement should not be given immediate effect to a case involving a school teacher and counselor who was involuntarily retired from his employment with school district when said retirement occurred prior to the passing of the Amendment but said Amendment became effective law prior to the issuance of the trial court's final judgment with regard to a multifaceted challenge including constitution issues to the School District' method and procedure used forcing Petitioner's retirement.

A. Whether the 1986 Amendment to the Age Discrimination in Employment Act (ADEA) should be

given immediate effect thereby making it unlawful to mandatorily retire the Petitioner from his position at Tucson Unified School District as a result of direction in the Act's construction regarding the Act's effective date and/or the presumption favoring immediate application of new law to cases heard on appeal.

B. Whether Tucson Unified School District Board Policy 4080 is unconstitutional as adopted and implemented because it violates Petitioner's Constitutional Right to Due Process in denying the Petitioner notice of the standards he was to be evaluated with regard to continued employment as

required by state law and not providing a clear definition of said standards.

LIST OF PARTIES

The parties to the litigation are:

1. JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife, plaintiffs, appellants, and petitioners herein.

2. TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, (hereinafter TUSD), a political subdivision of the State of Arizona, defendant, appellee and respondent herein.

3. THOMAS J. CASTILLO, in his capacity as a member of the School Board of TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, defendant, appellee and respondent herein.

4. EVA BACAL, in her capacity as a member of the School Board of TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, defendant, appellee and respondent herein.

5. THOMAS WRIGHT, in his capacity as a member of the School Board of TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, defendant, appellee and respondent herein.

6. LAURA ALMQUIST, in her capacity as a member of the School Board of TUCSON UNIFIED

SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, defendant, appellee and respondent herein.

7. RAUL GRIJALVA, in his capacity as a member of the School Board of TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, defendant, appellee and respondent herein.

8. MERRILL GRANT, in his capacity as a member of the School Board of TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, defendant, appellee and respondent herein.

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DECEMBER TERM, 1988

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

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Respondents.

PETITION FOR WRIT OF CERTIORARI

REFERENCE TO THE OFFICIAL OR UNOFFICIAL REPORT

The case presented was officially reported at Williams v. Tucson Unified School District No. 1, No. 2 CA-CV 87-0182, 760 P.2d 1081 (1987).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition for Certiorari from the September 20, 1988, decision of the Arizona Supreme Court denying review of the memorandum decision of the Arizona Court of Appeals dated December 10, 1987. Reconsideration of the Arizona Court of Appeals decision was denied on January 18, 1988. This Court has jurisdiction, pursuant to 28 U.S.C. § 1257(3), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution is involved in the case and states in pertinent part:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A.R.S. § 15-441 provides:

> "The Board of Trustees shall prescribe and enforce rules for the government of the schools, not inconsistent with laws or rules prescribed by the State Board of Education."

A.R.S. § 15-443 provides:

> "The Board of Trustees may, at any time, employ and fix the salaries of teachers . . . for the succeeding year."

The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 (as amended by 1986

Amendment) et seq.. is attached as Appendix B.

A.R.S. § 38-759.01 is attached hereto as Appendix C.

A.R.S. § 38-781.36 is attached hereto as Appendix D.

STATEMENT OF THE CASE

JOHN WILLIAMS (hereinafter referred to as WILLIAMS) was a continuing teacher in the Tucson Unified School District No. 1 of Pima County (hereinafter referred to as TUSD) where he was employed for thirty-one (31) years. During the 1981-82 and 1982-83 school years, WILLIAMS was a guidance counselor at Tucson High.

TUSD, a political subdivision of the State of Arizona, is located in Tucson, Pima County, Arizona. TUSD was governed by a Governing Board (hereinafter referred to as the Board). TUSD is engaged in the business of education and is an employer, employing teachers and counselors.

On April 17, 1983, WILLIAMS became seventy (70) years of age. WILLIAMS had the status of "continuing teacher" until he reached age seventy (70). At the time of WILLIAMS' retirement, he was the only employee of TUSD age seventy (70).

In November of 1982, WILLIAMS inquired about the method and process to continue his employment beyond age seventy (70). Prior to that, in 1978, WILLIAMS had requested an extension of employment beyond age sixty-five (65), at which time, the criteria were whether his leaving would be injurious to students in general and whether he was replaceable. Since then, and until November of 1982, no other TUSD employee sought to extend his employment beyond his normal retirement date.

Subsequent to receiving WILLIAMS' request for continued employment, TUSD discovered that Policy 4080, by which the Governing Board reviewed said requests, was in need of revision to bring it into compliance with A.R.S. §§ 38-759 and 38-759.01.

By letter dated January 23, 1983, WILLIAMS was informed that the Board had approved a procedure for extension of employment beyond age seventy (70) and was given a copy of the policy and the form to

apply for an extension of employment under new Policy 4080 which added a requirement of superior performance for the prior two (2) years.

WILLIAMS timely requested an extension of employment beyond age seventy (70) pursuant to new Board Policy 4080 on February 3, 1983. WILLIAMS' application for extended employment was reviewed by his supervisor, Gilbert A. Carrillo, and a designee of the Superintendent, Dr. Charles Grubbs, who decided not to recommend WILLIAMS for extended employment. On or about April 11, 1983, pursuant to the administrative procedures for Board Policy 4080, Section H, WILLIAMS appealed the decision of Dr. Grubbs to the Board of TUSD.

WILLIAMS expected that he had tenure rights to a contract for the 1983-84 school year. WILLIAMS was informed of the Board's decision not to offer him a contract renewal for the 1983-84 school year in a letter from

Merrill Grant, Superintendent, dated April 12, 1983.

On August 9, 1983, the Board of TUSD held a de novo hearing on WILLIAMS' request for extension of employment as allowed by the administrative procedures for Policy 4080. At that hearing, the Governing Board heard testimony from witnesses presented by counsel for both WILLIAMS and the school administration.

At the Board meeting of August 23, 1983, the Board denied WILLIAMS' request for extension of employment beyond age seventy (70).

On September 22, 1983, WILLIAMS submitted a Motion for Reconsideration to the Board.

At the Board meeting of December 6, 1983, WILLIAMS' Motion for Reconsideration was denied by the Board, causing the findings of August 9, 1983, to remain in full force and effect.

Williams filed his original Complaint against TUSD on January 10, 1984, in the Superior Court of Pima County. The Complaint contained several counts. At Count I of the Complaint, Williams raised the federal questions regarding denial of due process under the United States Constitution as follows:

> "That the hearing of August 9, 1983, deprived the Plaintiff of his constitutional rights to procedural and substantive due process; that the Board limited the scope of the testimony of the witnesses to preclude relevant activities outside the school; that the Board limited the number of witnesses to the hearing and precluded testimony it alleged to be repetitious; that the Board decided the that testimony of Plaintiff's counselees was incompetent to show either injury or replaceability; that the Board had no knowledge of the actual availability of other qualified counselors at the time of the original decision; that the Board applied a three prong test rather than the established two prong test under its Policy 4080; that the Board applied a replacement test based only on the facts that the personnel department had applications for counseling positions, but not based on the quality of counseling services

rendered by plaintiff: that the Board presented testimony that if the removal of a counselor caused injury to a student, that counselor had been doing his job improperly; that the policy of the Board in regard to continuance of employment is so vague and meaningless and without subjective standard as to deprive Plaintiff of the ability to present meaningful evidence."

WILLIAMS requested the Court to reinstate him to his previous position by finding that he met the requirements for continued employment, or to find said requirements unconstitutional or not properly followed and enter an Order staying the Board's decision, or to award him damages, including his loss of income from the counseling position, and to award him attorneys fees and costs or relief as the Court deemed just and proper. TUSD answered the Complaint on January 31, 1984. The parties agreed to submit the matter for trial on stipulated facts with extensive trial memoranda incorporating the Motions for Summary Judgment.

After oral argument and taking the matter under advisement, the Honorable Judge Pro Tem MICHAEL ALFRED entered Judgment in favor of TUSD and against WILLIAMS. With regard to the issue of Due Process of Law, the court found as follows:

> "19. Policy 4080 is not unconstitutionally vague. A vague law may violate due process if it fails to give fair warning. Cavco Industries v. Industrial Commission of Arizona, 129 Ariz. 429, 433, 631 P.2d 1087, 1092 (1981). This theory applies, however, only where there is a regulation of or sanction for conduct. Id. Policy 4080 did not regulate or sanction Williams' conduct.
>
> 20. Policy 4080 did not deny Williams Due Process of Law. Due Process
>
> > 'does not demand unobtainable feats of statutory clarity," United States v. Maude, 481 F.2d 1062, 1068 (D.C. Cir. 1973), and . . . "absolute precision in drafting laws is not demanded," particularly where the law does not impose a criminal penalty. High 01' Times, Inc. v. Busbee, 673 F.2d 1225, 1229 (11th Cir. 1982).'

Planned Parenthood of Central and Northern Arizona v. Arizona, 718 F.2d 938, 948 (9th Cir. 1983). The words "injury", "superior", and replaceable" in Policy 4080 are not unconstitutionally vague."

21. The doctrine of retroactivity is not applicable in this case because Policy 4080 did not impose a liability on John Williams. In addition, reasonable evidence supports the Governing Board's conclusion that Williams was not a superior counselor or employee after Policy 4080 was amended.

22. The manner and timing of the adoption of Policy 4080 were not unconstitutional, or arbitrary or capricious.

23. The implementation of Policy 4080 and the conduct of the hearing did not deprive Williams of due process of law."

Final Judgment, including Findings of Facts and Conclusions of Law, was entered January 30, 1987.

WILLIAMS filed a Motion for New Trial on February 17, 1987 wherein he reasserted his argument with regard to his being denied Due Process of Law at pages 17-20 and for the first time raised the issue of whether the 1986 Amendment to the Age Discrimination in

Employment Act of 1967, 29 U.S.C. 631(a) Section 12(a), which became effective January 1, 1987, should be given immediate effect. Therein WILLIAMS argued as follows:

> "The 1986 Amendment to the Age Discrimination in Employment Act of 1967 (hereinafter referred to as the Act) deletes the maximum age limitation of those people to be protected by the Act. 29 U.S.C. 631(a) Section 12a, as amended, limits the protection of the Act to those individuals who are at least forty (40) years of age. The purpose of the Act as set out in §2 is, "to promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment." (81 Stat. 603, 29 U.S.C. § 621(b)).
>
> The effective date of the Act is expressly set out as being January 1, 1987, with no mention as to whether the Act is to be applied retroactively to cases pending appeal at the effective date, except in relation to Sections 3 and 4 of the Act. Sections 3 and 4 of the Act deal with special provisions set out for Law Enforcement officers and firefighters. The fact that these causes of action are expressly limited against possible retrospective limitation shows that the Congress intended retrospective

operation to be available to all cases pending appeal relying on the other amendments to the Act not so limited. Mr. Williams presents a situation not limited by the Act in relation to retrospective operation. The basis of Mr. Williams' cause of action is the illegal mandatory retirement of a tenure teacher over seventy (70) years of age. The 1986 amendment to the Act was passed and became effective while Mr. Williams' case was pending appeal. His case does not fall under the special provisions prohibiting certain causes of actions from having available retrospective operation. Therefore, the Act should be applied retroactively to the case at bar thereby making it illegal to require the mandatory retirement of Mr. Williams based solely on age.

If the Court determines that the implied direction given in the language of the Act is not sufficiently clear, it still must apply the law as it exists at the time of hearing the case.

The 1986 amendment to the Act has included in its language an effective date. However, it does not state whether the Act is to be applied retrospectively or prospectively only. The only direction comes through negative implication that all sections other than 3 and 4 of the Act are to be applied retrospectively (§7 of the amendment). The legislative history is also absent specific direction as to legislative intent in relation to the issue. Absent direction to the

Employment Act of 1967, 29 U.S.C. 631(a) Section 12(a), which became effective January 1, 1987, should be given immediate effect. Therein WILLIAMS argued as follows:

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> contrary. [the United States Supreme Court case Bradley v. School Board of Richmond, 416 U.S. 696 (1974)] indicated that retrospective operation would be favored unless the application would result in manifest injustice."

Plaintiff responded on February 24, 1987, to which Plaintiff replied on March 3, 1987. Plaintiff then supplemented his Motion for Reconsideration on March 16, 1987. The Motion for Reconsideration was denied March 18, 1987. Wherein the court addressed the issues as follows:

> "Pursuant to minute entry dated March 18, 1987, in the above-captioned matter,
>
> IT IS HEREBY ORDERED that Plaintiff's Motion for New Trial and Motion for Reconsideration of Award of Attorney's fees is denied."

Notice of Appeal was filed April 21, 1987, along with a cost bond. A supersedeas bond of $10,000.00 was posted by WILLIAMS to cover attorney's fees awarded against him in favor of TUSD.

WILLIAMS timely filed his Notice of Appeal to the Arizona Court to Appeals on

April 21, 1987. WILLIAMS submitted his Opening Brief on August 7, 1987. Therein, the issue of Due Process was readdressed at pages 29-45 which can be summarized as follows:

> "WILLIAMS was deprived of a protectable liberty interest by the action of the Governing Board in denying his continued employment under Policy 4080 and A.R.S. § 38-759.01. WILLIAMS had a protectable property interest as provided for by the retirement statutes, specifically A.R.S. § 31-759.01. WILLIAMS had an expectancy of continued employment past age seventy (70), since a state employee with satisfactory performance may continue employment beyond age seventy (70) after having his extension approved pursuant to the procedure adopted. WILLIAMS also had a protectable property interest, an economic expectancy, in the benefit acquired by him pursuant to the retirement statutes. The Court in Board of Regents v. Roth, 408 U.S. at 577, stated:
>
> > 'To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it * * * Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--

> rules or understandings that support claims of entitlement to those benefits.'

A protectable property interest in public employment exists when created by state law and is not precluded by the absence of a state procedure for its protection. McDonald v. Mims, 577 F.2d 951 (1978); Dixon v. Osmand, 22 Ariz. App. 430, 528 P.2d 181 (1974). The Court in Dixon v. Osmand, 22 Ariz. App. at 432, noted:

> 'There especially is no property right involved when the only thing at stake is a specific job for which the individual has only an abstract need or desire, rather than a legitimate claim of entitlement to that job based on contract, statute, or regulation.' (emphasis added)

The Plaintiff had protectable property or liberty interests sufficient to invoke due process requirements. School boards and school board members represent state agencies within the ambit of the Fourteenth Amendment protection. Arthur v. Nyguist, 415 F.Supp. 904, (W.D. N.Y. 1976). The action of the Governing Board in denying WILLIAMS' request under Policy 4080 and A.R.S. §38-759.01 deprived WILLIAMS of property or liberty interests protected by procedural due process.

The purpose of procedural due process is to insure accurate decision making. TUSD failed to give WILLIAMS proper notice. The requirement for notice and an opportunity for hearing may vary. However, a meaningful time and in a meaningful manner is required. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). It is apparent that TUSD failed to give proper notice to WILLIAMS. The Governing Board knew that WILLIAMS' 70th birthday was approaching and that when he requested the procedure, it had no procedure for him to follow. The importance of informing employees of the requirements of Policy 4080 well before retirement date was brought to the attention of the Governing Board by THOMAS WRIGHT on January 4, 1983, when Policy 4080 was adopted:

> 'Wright: . . . in that we, I think, are entering into this trying to be consistent with what's expected of us by the State. I think what we need to do, also, is to develop the framework so as we do put our employees on notice so that they do know that there is a policy. . . And I don't know if we should set it up so that if an employee is in that age grouping that at a certain time he be

notified that there is an existing policy and there is a timeline that must be followed. I would think that should be part of what we do with this policy.' Exhibit F to SOF, p. 400003.

MR. MURRIETA replied to MR. WRIGHT'S concern:

'Murrieta: One, one of the things I'd like to, to mention in, in, in addition to what Mr. Wright has said is we intend to, to inform people that may be coming up for, for that particular age or birthdate, a couple of years ahead of time, that this is the framework or this is the policy. . . . The administrative procedures have been developed in, in compliance with the policy if you choose to adopt that. So from here, we intend to notify all people as they approach that particular age.' (emphasis added) Exhibit F to SOF, p. 400003.

Although the importance of notifying employees of the policy well before retirement was acknowledged by the Board, the District applied Policy 4080, even though the policy did not exist and was created upon WILLIAMS' request. WILLIAMS was not told of

the requirements of the policy until less than three (3) months before he attained the age of seventy (70).

B. TUSD Adopted Vague and Meaningless Criteria in Its Policy.

A statute is unconstitutionally vague if persons of common intelligence must necessarily guess at its meaning and differ as to its application. In that situation, the statute fails to give a person of ordinary intelligence fair notice of conduct proscribed or required by the statute and encourages arbitrary and erratic behavior on the part of those officials charged with enforcing the statute. Planned Parenthood of Northern and Central Arizona v. State of Arizona, 718 F.2d 938 (C.A. Ariz. 1983). Policy 4080 established a two-prong test to be applied in extension requests. yet, the school administration argued before the Governing Board that WILLIAMS had to meet a four-prong test. Sections (A)(2) and (3) of Board Policy 4080 provide:

> '2. Such employee's supervisor certifies that the employee's performance over the last twenty-four months work has been superior and the supervisor recommends approval of the request;
>
> 3. The Superintendent or designee certifies that, after considering the employee's experience,

> training, employment history, and abilities, the job description, and the availability of qualified replacements, he or she has concluded that retirement of the employee would prove injurious to the welfare of students in general or that the employee would be difficult to replace, and recommends that the request be granted; and,' (emphasis added) Exhibit B to SOF, p. 1130.

The first prong of the test to be met under Policy 4080 is superior conduct and the second is either injury to the students or difficulty in replacement. The second prong of the test was in existence as part of the District's retirement policy when the constitutionality of the retirement statutes was upheld in Lewis v. Tucson School District No. 1, 23 Ariz. App. 154, 531 P.2d 199 (1975). Policy 4080 was modified in its implementation by the administrative procedure which turned the two-prong test into a four-prong test, each criteria to be determined by both the supervisor and the Superintendent or designee.

The Administrative Procedures for Board Policy 4080, Section (D) states:

> 'D. Within approximately 21 days of the request, the supervisor shall inform the employee and

the Personnel Department in writing of the following initial determinations:

1. Whether the employee's performance over the last twenty-four months worked has been superior;

2. Whether the retirement of the employee would prove injurious to the welfare of the students in general;

3. Whether the employee would be difficult to replace; and

4. Whether the supervisor supports the request.

Brief reasons shall be given for each of the four determinations. If <u>any</u> of the <u>four</u> determinations are "no", the request for extension shall be considered denied. The employee may appeal the determinations by . . . giving brief reasons why <u>each</u> of the <u>four</u> determinations should be "yes". . . . If all <u>four</u> determinations are yes, the supervisor shall notify the Personnel Department in writing of said determinations. . . .

Section G requires the Superintendent to notify the employee of the outcome in regard to each of the four determinations along with brief reasons for said outcome. The alternative tests of Policy 4080 are vague and indefinite and were obviously misconstrued by the Board.

Policy 4080 as applied was so vague that WILLIAMS could not gain a reasonably clear idea of what the policy required him to prove, and deprived him of the ability to present meaningful evidence and an opportunity to be heard in a meaningful manner. See Armstrong v. Manzo, supra; Franklin v. First Money Inc., 427 F.Supp. 66 (1976).

C. The Requirements of Policy 4080 are Vague and Cannot Be Rendered Meaningful By Any Similar Requirements Extrinsic to the Policy Itself.

Although the Governing Board had discretion in adopting procedures for considering retirement extensions, it can not be allowed to adopt vague, meaningless requirements, impossible to meet.

One of the requirements for statutory validity is that the language of the statute in question must be "sufficiently definite so that those who are to execute the law may do so in a rational and reasoned manner." Cohen v. State, 121 Ariz. 6, 9, 588 P.2d 299, 302 (1978). The superior level of

performance requirement enunciated in Section 2 of Policy 4080:

> '2. Such employee's supervisor certifies that the employee's performance over the last twenty-four months worked has been superior and the supervisor recommends approval of the request.' (emphasis added) Exhibit B to SOF, p. 1130.

The central question is whether "superior" is sufficiently defined for the purpose of upholding the validity of Policy 4080.

Within the Policy, itself, there are no guidelines or criteria enumerated that would help the Governing Board evaluate an applicant. The actual Administrative Procedures promulgated under Section B, Exhibit B to SOF, p. 1130 only parrot the "superior" requirement. Administrative Procedures for Board Policy 4080, Section (D)(1), Exhibit B to SOF, p. 1132. It sheds no light on what "superior" means or what the Board should consider to determine its application in any given case. Without guidance, the Board is left to make a wholly subjective judgment, rendering the decision improper.

The only review criteria otherwise used by the Governing Board is based on the standard of inadequate performance. A.R.S. § 15-538 deals with the dismissal of probationary teachers. There the standard used

> is whether the teacher is inadequate in his or her classroom performance. A.R.S. § 15-539(B) employs the same standard focusing on inadequate performance as compared to the "superior" standard looked to in the case at bar when dealing with the dismissal of continuing teachers. Under Policy 4080, the Board is called upon to reverse its traditional analysis without criteria in which to base its determinations."

WILLIAMS also addressed the issues pertaining to the application of the 1986 Amendment to the ADEA. Said arguments were presented at pages 10-22 and are summarized as follows:

> "A major issue brought up in Motion for Reconsideration or to Amend or Alter Judgment was the passage and retrospective application of the 1986 Amendment to the Age Discrimination in Employment Act of 1967 (hereinafter referred to as the ADEA) which occurred after the briefing and argument of the Trial Memorandum. The law as set out in the ADEA as amended made TUSD's actions in mandatorily retiring WILLIAMS directly and expressly illegal and improper. To find otherwise is contrary to the law. The Trial Court was presented the law, as set out, which would require the immediate application of the 1986 Amendment to the facts presented but failed to grant the

relief requested. Upon review, the Appellate Court is not bound by the conclusions of law made by the Trial Court but is free to draw its own conclusions from evidence presented. Walsh v. Eberlein, 114 Ariz. 342, 560 P.2d 1249 (Ariz. App. 1976). The Court of Appeals can substitute its own conclusions of law for those of the Trial Court, Packer v. Donaldson, 16 Ariz. App. 294, 492 P.2d 1232 (Ariz. App. 1972).

The 1986 to ADEA deletes the maximum age limitation of those people afforded the ADEA's protection. 29 U.S.C. 631(a) Section 12a, as amended, limits the protection of the Act to those individuals who are at least forty (40) years of age. The purpose of the ADEA as set out in §2 is, 'to promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment.'

U.S. v. Schooner Peggy, 5 U.S. 103 (1801), established the general rule of retroactive application of statutes through immediate application of substantive legislation to pending cases. Schooner Peggy served to introduce the general rule of retroactive application when Judge Marshall wrote:

> 'It is in the general true (sic) that the province of

> an appellate court is only to enquire (sic) whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of an appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its application denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere cases between individuals, a court will and ought to struggle hard against a construction which will, by retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of the law, the judgment must be set aside.'

In Schooner Peggy, the United States seized a French vessel and brought condemnation proceedings eventually appealing to the Supreme Court. While the case was pending appeal, the United States entered into a convention with France, which provided that, "property captured,

and not yet definitely condemned . . . shall be mutually restored." 5 U.S. (1 Cranch) at 107, emphasis in the original. The Supreme Court applied the convention, creating the general rule that in matters of great national concern, immediate application of new law should be applied on a broad basis at the appeal level. The strength and viability of Schooner Peggy is evidenced by the myriad cases applying it to various kinds of amendments: Dinsmore v. Southern Express Co., 183 U.S. 115 (1901) (Amendment to War Revenue Act of 1898 used to dismiss suit brought under the Act); Watts, Watts & Co. v. Unione Australia, 248 U.S. 9 (1918), (applying change in U.S. World political posture relating to WWI allowing suit against alien enemy); Crozier v. Krupp, 224 U.S. 290 (1911) (Act of 1910 used to deny injunction against future use of patent); Ziffrin, Inc. v. United States, 318 U.S. 73 (1943), (applying Interstate Commerce Act amendment to pending permit application); and United States v. Alabama, 362 U.S. 602 (1960), (applying Civil Rights Act of 1960 to a case pending appeal; the act created a cause of action against the State).

The Court further strengthened the Schooner Peggy doctrine in Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). Thorpe involved a tenant evicted from a federally funded housing project. While on appeal to the Supreme Court, the Department of Housing and Urban

Development ordered new procedural requisites for an eviction. The Supreme Court held that an Appellate Court must apply the law as it exists at the time it renders a decision and, therefore, the tenant was entitled to the protections afforded in the H.U.D. circular passed after the case was originally filed. The circular referenced did not indicate whether it was to be applied to pending cases or to events that had transpired prior to its issuance. The Thorpe decision establishes that even if the intervening law does not explicitly recite that it is to be applied to pending cases, the new law is to be given recognition and effect.

The Court, in Thorpe, observed that certain exceptions to the general rule exist "to prevent manifest injustice." Id at 282. Bradley v. School Board of Richmond, 416 U.S. 696 (1974), reiterating the Thorpe decision, set out clear guidelines for determining whether a situation should be excepted from the general rule of Schooner Peggy. Bradley stated that immediate application and operation of new law was not to be available when there was statutory direction or legislative history to the contrary, or when the legislation's application would result in manifest injustice.

The ADEA Amendment at issue was passed and became effective after WILLIAMS filed his original Complaint against TUSD but before

the Motion for Reconsideration and this appeal were filed. As such, the WILLIAMS' case is controlled by the general rule set out in Schooner Peggy, as reaffirmed and explained in Thorpe and Bradley. The ADEA Amendment includes an effective date and has no legislative statutory direction contrary to its immediate application. In fact, the language of the Amendment implies that the portion relating to the issue at hand is given immediate effect. The statute has specifically restricted some immediate application with no mention of the issue at hand. The resulting inference, intent and direction is in favor of lifting the maximum age cap and allowing WILLIAMS the protection available under ADEA. WILLIAMS must be allowed the protection of ADEA making it unlawful for TUSD to retire him. At the very least, the language of the Amendment is not contrary to the immediate application in accordance with the Bradley criteria.

Absent direction to the contrary, Bradley indicated that retrospective operation is favored unless it would result in manifest injustice. A finding of manifest injustice requires an examination of the identity of the parties, the nature of their rights and the impact that the changed law has on those rights. There is no manifest injustice in the immediate application of the ADEA to WILLIAMS and his forced retirement should be deemed illegal."

The Appellees filed their Answering Brief on September 22, 1987, and WILLIAMS replied on October 7, 1987. Argument was had before the court on December 2, 1987. The court issued its Opinion on December 10, 1987. The Arizona Court of Appeal's Opinion is set forth in its entirety at Appendix H.

The Federal questions were presented to the Arizona Supreme Court in Petition for Review filed February 3, 1988. The issues of immediate application of the 1986 Amendment of the ADEA were presented at pages 9-12 as follows:

> "I. The Court of Appeals has held that the 1986 Amendment to the ADEA, 29, U.S.C.A. § 631(a) § 12(a) is not applicable to the facts at bar. In rendering its decision, the Court agreed with TUSD's contention that since WILLIAMS had been retired prior to the effective date of the Amendment, he does not have a "pending" case to which immediate application of the new law is available. This is an incorrect application of the law existing on issue. U.S. v. Schooner Peggy, 5. U.S. 103 (1801), established the general rule favoring immediate application of new legislation to cases being heard at the Appellate

level. Bradley v. Richmond School Board, 416 U.S. 696 (1974), reaffirmed the doctrine and stated that "a Court is to apply the law in effect at the time it renders its decision." Id., at 711. Prior to the Court of Appeals hearing the case at bar, the 1986 Amendment to the ADEA became effective making it unlawful to retire persons over age seventy (70) based solely on that person's age. In accord with Schooner Peggy, and Bradley, the Court of Appeals was required to apply the law as it existed at the time it rendered its decision. The Court of Appeals has focused on the fact that WILLIAMS had been retired prior to the action and claims; therefore, in its opinion, the case is not pending. In so deciding, the Court has altered the direction provided by the U.S. Supreme Court in Schooner Peggy and Bradley. Precedent requires the Court to focus on whether the case was pending appeal at the time the Amendment became effective. The fact that the actions which were the subject of the case had passed is irrelevant and should not be the basis for denying immediate application of existing law.

II. The Court of Appeals did not apply the test set out in Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), used to determine whether a case pending appeal should be granted immediate application of effective law. Instead the Court of Appeals appears to limit the immediate application doctrine to situations where the

change merely provides a new remedy to an existing claim, or, in the alternative, is merely providing a procedural change in the law. In support of its ruling, the Court cites Bradley, supra, and the United States v. Alabama, 362 U.S. 602.

Bradley, supra, firmly established the doctrine favoring immediate application of new law while recognizing certain limitations. The Court held that the immediate application and operation of new law was not available when there was statutory direction or legislative history to the contrary or when the application would result in manifest injustice. The Bradley Court provided further direction by setting out the necessary elements to be reviewed for a finding of manifest injustice. Therein, the Court held that a finding of manifest injustice requires an examination of the identity of the parties, the nature of their rights and the impact that changed law has on those rights.

In the case at bar, the Bradley case was cited for the proposition that immediate application not be extended to areas where the change creates a cause of action. Although it is noted that the facts present in Bradley involved a new amendment providing a new remedy to an already existing action, the Court only viewed those facts as a factor to be considered and not the final test used in determining whether an amendment should be given immediate effect. In the case at bar, the

Court of Appeals has replaced the facts specific to Bradley for the legal analysis provided as precedent.

The Court of Appeals cites United States v. Alabama. 362 U.S. 602 (1960), in support of TUSD's proposition that the doctrine's application be limited to procedural changes in the law. This is not a correct reading of U.S. v. Alabama. In fact, U.S. v. Alabama is an example of a substantive change in the law given immediate effect to a case pending Appeal, thereby U.S. v. Alabama provides precedent for just the opposite what the Court of Appeals cites it for. The Supreme Court should review the facts present at bar and apply the test set forth in Bradley, thus disregarding the incorrect analysis used by the Court of Appeals."

The issues concerning the denial of Due Process were addressed at pages 13-15 of the Petition for Review:

In addressing WILLIAMS' Due Process claims, the Court of Appeals held that Policy 4080 was not vague and that he was not denied notice of the standards on which he was to be evaluated. The Court supports its decision by showing that WILLIAMS presented testimony at hearing in support of his meeting the necessary criteria. The Court in essence is saying that WILLIAMS could not have presented evidence on his behalf if he truly was denied Due Process.

This is not the case. The Arizona Supreme Court in Cohen v. State, 121 Ariz. 6, 9, 588 P.2d 299, 302 (1978), noted:

> 'Indefiniteness (sic) in any statute may constitute an unconstitutional denial of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article 2, § 4 of the Arizona Constitution when it is so vague that men of common intelligence must guess at its meaning and differ as to its application . . . . Furthermore, the statutory language must be sufficiently definite so that those who are to execute the law may do so in a rational and reasoned manner.'

The fact that WILLIAMS attempted to present evidence as to what he considered his definition of the standards prescribed, does not mean that they are not vague. It instead helps establish that "men of common intelligence must guess at its meaning and differ as to its application." There were no guidelines or criteria established to help either WILLIAMS or his evaluators determine what was necessary to be considered "superior" and thereby meet the newest requirement under Policy 4080. It is only natural that absent some guideline as to what

criteria was being used to evaluate WILLIAMS, he would present evidence consistent with his personal opinion.

The vagueness and ambiguity of the test was consistently evidenced by comments of the Board when they denied WILLIAMS' extension. An example is Ms. Bacal's comment in regard to the difficulty of proving the second prong of the test. Ms. Bacal expressed to WILLIAMS:

> 'The other two points are very difficult to show or prove. And I have been informed by our legal counsel that the burden of proof is not with us but with you. And so I was not convinced.' Exhibit A to Statement of Facts, p. 1-6.

Bacal indicated that the burden was strictly with the claimant. While ordinarily a party asserting a fact has the burden of proving the fact when the other party has peculiar means of knowledge enabling him to prove it, the burden is on the party with information available to it. G.E.J. Corp. v. Uranium Aire, Inc., 311 F.2d 749 (C.A. Ariz. 1962); Southwest Cotton Co. v. Ryan, 22 Ariz. 520, 199 P.124 (1921).

The implementation of Board Policy 4080 also denied WILLIAMS notice of those requirements necessary to receive an extension of his employment. The policy setting the criteria was established in response

to WILLIAMS' request; however, as part of the criteria, the performance of WILLIAMS was evaluated over a two-year period before the Policy or criteria was even created, let alone shown to WILLIAMS. Mr. Wright expressed concern on this matter on January 4, 1983, when the Policy was adopted:

> 'Wright: . . . in that we, I think, are entering into this trying to be consistent with what's expected of us by the State. I think what we need to do, also, is to develop the framework so we do put our employees on notice so that they do know that there is a policy . . . And I don't know if we should set it up so that if an employee is in that age grouping that at a certain time he be notified that there is an existing policy and that there is a timeline that must be followed. I would think that should be part of what we do with this policy.' Exhibit F to Statement of Facts, p. 400003.

Board Policy 4080 held WILLIAMS to a standard created after the period of time it was used to evaluate him. Due Process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and an opportunity to present

their objections." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950). WILLIAMS was evaluated and then informed of the criteria after the fact. The Court of Appeals incorrectly applied the law when it stated that WILLIAMS was not denied Due Process."

WILLIAMS' Petition for Review was denied on September 20, 1988, thereby affirming the decisions of the Court of Appeals.

ARGUMENT

The Arizona courts have decided the federal questions concerning Due Process of Law as required by the 14th Amendment to the United States Constitution and the immediate application of new law to cases pending appeal in a way contrary to applicable U.S. Supreme Court decisions. The Arizona Courts relied on interpretations set forth in lower court opinions that have not been specifically espoused by the United States Supreme Court. This case is important to provide clear meaning and guidance to areas of law that are presently being interpreted in opposing manners causing conflict in lower court holdings. The United States Supreme Court should review this case and rule in a manner consistent with its prior rulings thereby overruling the Arizona courts. The issues have been addressed at length by the parties as is referenced in the Statement of the Case.

supra, thereby meeting the jurisdictional prerequisites.

With regard to immediate retrospective application of new law to a case pending appeal, this Court first addressed the issue in 1801 in the case U.S. vs. Schooner Peggy, 5 U.S. 108, (1801). Justice Marshall wrote:

> "If subsequent to the judgment and before the decision of an appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its application denied. If the law be constitutional . . . I know of no court which can contest its obligation . . . . In great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of the law, the judgment must be set aside." 5 U.S. 108.

The strength and viability of Schooner Peggy, 5 U.S. 108, is evidenced by the myriad cases applying it to various kinds of amendments: Dinsmore v. Southern Express Co., 183 U.S. 115 (1901) (Amendment to War Revenue Act of 1898 used to dismiss suit brought under the Act);

Watts, Watts & Co. v. Unione Australia, 248 U.S. 9 (1918), (applying change in U.S. World political posture relating to WWI allowing suit against alien enemy); Crozier v. Krupp, 224 U.S. 290 (1911) (Act of 1910 used to deny injunction against future use of patent); Ziffrin, Inc. v. United States, 318 U.S. 73 (1943), (applying Interstate Commerce Act amendment to pending permit application); and United States v. Alabama, 362 U.S. 602 (1960), (applying Civil Rights Act of 1960 to a case pending appeal; the act created a cause of action against the State).

Schooner Peggy, 5 U.S. 108 was reaffirmed and clarified by the court in its ruling in Bradley v. School Board of Richmond, 416 U.S. 696 (1974). Bradley 416 U.S. 696 established clear guidelines for determining whether a situation should be excepted from the general rule of Schooner Peggy, 5 U.S. 108. Bradley, 416 U.S. 696, held that immediate application and operation of new law

was only to be denied only when there was statutory direction or legislative history to the contrary, or when the legislation's application would result in manifest injustice.

The ADEA Amendment at issue was passed and became effective after WILLIAMS filed his original Complaint against TUSD but before the final Judgment of the Superior Court was signed on January 30, 1987, and before the Motion for Reconsideration was filed. As such, the WILLIAMS' case is controlled by the general rule set out in Schooner Peggy, 5. U.S. 108 as reaffirmed and explained Bradley, 416 U.S. 696. The ADEA Amendment includes an effective date and has no legislative or statutory direction contrary to its immediate application. Instead, the language of the Amendment implies that the applicable provisions be given immediate effect. The statute specifically restricted some immediate applications but did not so limit the

provisions discussed herein. The resulting inference, intent, and direction requires voiding the maximum age cap, allowing WILLIAMS the protection available under ADEA, and making mandatory retirement of him unlawful.

Absent direction to the contrary, Bradley, 416 U.S. 696, requires retrospective operation of new law unless it results in manifest injustice. A finding of manifest injustice requires examination of the identity of the parties, the nature of their rights and the impact that the changed law on those rights. There was and is no manifest injustice in the immediate application of the ADEA to WILLIAMS. His forced retirement should be found illegal. In Arizona courts, WILLIAMS has set forth his arguments on why there is no manifest injustice to the immediate application of the ADEA. However, the Arizona courts have avoided the full Bradley, 416 U.S. 696, test and, instead, have

denied said application based on federal district court decisions refusing to apply Bradley 416 U.S. 696 to pending cases when the new law creates a substantive cause of action, (e.g., Weise v. Syracuse University, 522 F.2d at 410-411 (1975)). United Supreme Court cases have recognized and approved immediate application of substantive law in which a cause of action was created. Most notable is United States v. Alabama, 362 U.S. 602 (1960) (per curiam) involving a lower court's dismissal on the grounds that the Civil Rights Act of 1957 did not authorize Plaintiff's claim against the State of Alabama (current version at 42 U.S.C. § 1971(a)(1976)), for denying his right to vote. While the appeal was pending, Congress amended the Civil Rights Act and created just such a cause of action. The Court held that the amendment applied to the dismissed case and remanded the case to the federal district court for trial. Id. at 604.

The Court's retroactive application of newly "created causes of action" does not hinge on distinction between substance versus procedure. The cases cited by TUSD appearing to limit the general rule of Schooner Peggy, 5 U.S. 103, upon a proper analysis, are ones in which the fact situation required a finding of manifest injustice as determined by the Bradley, 416 U.S. 696, criteria. Instead of making the requisite step-by-step analysis, the majority of the lower court's decisions just state that a manifest injustice would result. The bases of the findings are, therefore, impossible to trace.

Bradley, 464 U.S. 696 cited the Greene v. United States, 376 U.S. 149 (1964) (denying retroactive application of a Department of Defense regulation) decision adopting its vested rights test as one criterion for a finding of manifest injustice. In doing so, Bradley, 464 U.S. 696, did not limit the general rule to only procedural laws.

Instead, it allowed an analysis of all laws to determine whether application would interfere with vested and matured rights. While it is true substantive changes in the law are most likely to cause this form of injustice, the court did not limit the respective application of new law to only procedural changes.

This Court, citing Greene, 376 U.S. 149, for a rule of construction only, ruled in the case of Bennett v. New Jersey, 470 U.S. 632 (1984), after applying the Bradley 416 U.S. 696 test. Therein, the Court held that the substantive standards of the 1978 Amendments to the Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27, as amended, 20 U.S.C. § 241a, et seq., (1976 ed.), were not to be applied retroactively. In addressing the relevance of Bradley, 416 U.S. 696, to the facts presented in Bennett, 470 U.S. 632, the Court set forth rationale applying the third prong of the Bradley, 416 U.S. 690, test:

> "Practical considerations related to the enforcement of the requirements

> of grant-in-aid programs also suggest that expenditures must presumptively be evaluated by the law in effect when the grants are made. The federal auditors who completed their review of the disputed expenditures in 1975 could scarcely base their findings on the substantive standards adopted in the 1978 Amendments. Similarly, New Jersey when it applied for and received Title I funds for the years 1970-1972 had no basis to believe that the propriety of the expenditures would be judged by any standards other than the ones in effect at the time. Retroactive application of changes in the substantive requirements of a federal grant program would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures are proper." Id. at 631.

The Court put its emphasis on the fact that there was no alternative prior to the Amendment to the statute:

> "As we explained in our first decision in this case, "the pre-1978 version [of Title I] contemplated that States misusing federal funds would incur a debt to the Federal Government for the amount misused." 461 U.S., at 782. Although our conclusion was based on statutory provisions, id., at 782-290, we also acknowledged that Title I, like many other federal grant programs, was "much in the nature of a contract."

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). "The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I." 461 U.S., at 790. A State that failed to fulfill its assurances has no right to retain the federal funds, and the Federal Government is entitled to recover amounts spent contrary to terms of the grant agreement. Id., at 791; see id., at 794 (WHITE, J., concurring). In order to obtain the Title I funds involved here, New Jersey gave assurances that the money would be distributed to local education agencies for programs that qualified under the existing statute and regulations. See 20 U.S.C. § 241f(a) (1976 ed.); 45 CFR § 116.31(C) (1972). Assuming that these assurances were not met for the years 1970-1972, see 461 U.S., at 791, the State became liable for the improper expenditures; as a correlative, the Federal Government had, before the 1978 Amendments, a pre-existing right of recovery. Id., at 782, and n. 7." Id. at 631, 632.

In the case at bar, the opposite is true. WILLIAMS was entitled to continued employment pursuant to state statutes A.R.S. § 38-759.01 and A.R.S. § 38-781.36 and was only denied same pursuant to an unconstitutionally adopted

policy after his application for said continued employment. In addition, when the ADEA was amended in 1978, legislative history indicated a strong disapproval toward mandatory retirement, generally, and forecast the subsequent removal of the age cap provision. S. Rep. No. 493, 95 Cong. (1978) N.R. Rep. No. 950 95 Cong. (1978).

The appropriate interpretation of the Bennett, 470 U.S. 632, was made in U.S. v. Hill, 676 F. Supp. 1158 (N.D. Fla. 1987). Therein the Court held that Bennett, 470 U.S. 632, did not limit Bradley, 416 U.S. 696, but, instead, simply applied the factors as they were expressed in the Bradley, 416 U.S. 696, decision:

> "[The] Court held that the Bradley presumption regarding retroactivity was effectively rebutted since the Government possessed a right of recovery that "had matured or [had] become unconditional." Id. (quoting Bradley, supra, 416 U.S. at 720, 94 S.Ct. at 2020). Thus, I do not read Bennett as severely restricting the Bradley presumption. To the contrary, Bennett appears to be nothing more than an application of

> Bradley to facts which, upon analysis by the Court, displaced Bradley's presumption of retroactivity."

As the case law presently stands, courts are interpreting the Bradley, 416 U.S. 696, presumption of immediate application of new law in an inconsistent manner. The result in the case at bar was a failure in the Arizona courts to properly review the fact situation presented. The courts ignored the three pronged test set forth in the Bradley, 416 696, decision, and, instead, relied on apparently conflicting lower federal court decisions. As such, it is necessary to provide clear direction as to the intent of Bradley, 416 U.S. 696, and reaffirm its language and requirements with regard to immediate application of new law to cases pending appeal. The facts of the case at bar are sufficiently narrow to allow the court to clear up any ambiguity with regard to proper application of the Bradley, 416 U.S. 696,

test requiring immediate application of the 1986 Amendment to the ADEA.

With regard to the Due Process claim raised by WILLIAMS, the Arizona courts have misapplied the law promulgated by this Court.

Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them. Miranda v. State of Arizona, 384 U.S. 436 (1966). In passing upon the constitutionality of a statute, the Court has a duty of determining whether the statute is clearly prohibited. Arizona Podiatry Ass'n. v. Director of Ins., 101 Ariz. 544, 422 P.2d 108. (1967). The procedures and substance of TUSD's retirement policy violate constitutional due process. Liberty or property interests include the right to contract and engage in occupations. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

WILLIAMS was deprived of a protectable liberty interest by the action of the

Governing Board in denying his continued employment under Policy 4080 and A.R.S. § 38-759.01. WILLIAMS had a protectable property interest as defined by the retirement statutes, A.R.S. § 31-759.01 and/or A.R.S. § 38-781.36. WILLIAMS had an expectancy of continued employment past age seventy (70), because a state employee with satisfactory performance may continue employment beyond age seventy (70) after having his extension approved pursuant to the procedure adopted. WILLIAMS also had a protectable property interest, an economic expectancy, in the benefit acquired by him pursuant to the tenure and retirement statutes. The Court in Board of Regents v. Roth, 408 U.S. at 577, stated:

> "To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it * * * Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or

> understandings that support claims of entitlement to those benefits."

A protectable property interest in public employment exists when created by state law and is not precluded by the absence of a state procedure for its protection. McDonald v. Mims, 577 F.2d 951 (1978); Dixon v. Osmand, 22 Ariz. App. 430, 528 P.2d 181 (1974). The Court in Dixon v. Osmand, 22 Ariz. App. at 432, noted:

> "There especially is no property right involved when the only thing at stake is a specific job for which the individual has only an abstract need or desire, rather than a legitimate claim of entitlement to that job based on contract, statute, or regulation." (emphasis added)

The Plaintiff had protectable property or liberty interests sufficient to invoke due process requirements. School boards and school board members represent state agencies within the ambit of the Fourteenth Amendment protection. Arthur v. Nyguist, 415 F.Supp. 904, (W.D. N.Y. 1976). The action of the Governing Board in denying WILLIAMS'

request under Policy 4080 deprived WILLIAMS of property or liberty interests protected by procedural due process.

The implementation of Policy 4080 and the manner in which the hearing of August 9, 1983, was conducted denied WILLIAMS due process of law. Substantive due process is the right not to be subjected to arbitrary governmental actions. Jones v. Parmer, 421 F.Supp. 738 (S.D. Ala 1976); Feinberg v. Federal Deposit Ins. Corp., 420 F.Supp. 109 (D.D.C. 1976). Procedural due process is the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Fuentes v. Shevin, 407 U.S. 67, reh. den. 409 U.S. 902 (1972). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950). "[T]he purpose of

notice under the Due Process Clause is to appraise the affected individual of, and permit adequate preparation for, an impending hearing." Memphis Light, Gas, & Water Division v. Craft, 436 U.S. 1 (1978).

WILLIAMS has been denied both his procedural right to notice of how he was being judged and his substantive right to not be subjected to arbitrary governmental actions.

The purpose of procedural due process is to insure accurate decisionmaking. TUSD failed to give WILLIAMS proper notice. The requirement for notice and an opportunity for hearing may vary. However, a meaningful time and in a meaningful manner is required. Armstrong v. Manzo, 380 U.S. 545 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306. It is apparent that TUSD failed to give proper notice to WILLIAMS. The Governing Board knew that WILLIAMS' 70th birthday was approaching and that when he

requested the procedure, it had no procedure for him to follow.

A statute is unconstitutionally vague if persons of common intelligence must necessarily guess at its meaning and differ as to its application. In that situation, the statute fails to give a person of ordinary intelligence fair notice of conduct proscribed or required by the statute and encourages arbitrary and erratic behavior on the part of those officials charged with enforcing the statute. Planned Parenthood of Northern and Central Arizona v. State of Arizona, 718 F.2d 938 (C.A. Ariz. 1983).

Policy 4080 as applied was so vague that WILLIAMS could not gain a reasonably clear idea of what the policy required him to prove, and deprived him of the ability to present meaningful evidence and an opportunity to be heard in a meaningful manner. See Armstrong v. Manzo, 380 U.S. 545; Franklin v. First Money Inc., 427 F.Supp. 66 (E.D. La.

1976). The replacement test, and the alternative injury test, violate due process because no reasonable interpretation consistent with the alleged purpose of the state can be advanced. Insurer's Action Council, Inc. v. Ideaton, 423 F. Supp. 921 (D Minn 1976); Koch v. Ynich, 533 .F.2d 80 (2d Cir. 1976). While the standards for making employment decisions must be flexible, they must also be capable of meaningful interpretation and legitimate ability to provide evidence.

The Arizona Courts usually recognize the common law rule that Courts will not apply vague laws. Cavco Industries v. Industrial Commission of Arizona, 129 Ariz. 429, 631 P.2d 1087 (1981); Southwest Engineering Co. v. Ernst, 79 Ariz. 403 291 P.2d 764 (1955); State Compensation Fund v. De La Fuente, 18 Ariz. App. 246, 501 P.2d 422 (1972). However, in the case at bar, the Arizona Courts upheld unique and meaningless

standards. These deficiencies precluded WILLIAMS from presenting the type of evidence required for extension approval.

The issues of Due Process raised are vital to all state employees and the method standards in which they are evaluated are determined. Absent such protection as provided by the United States Constitution, state employees will be subject to the caprice of the state without explanation or a fair opportunity to be heard.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

DATED this 19 day of December, 1988.

BUSBY, McCRACKEN & BELL, P.C.

By _____
CATHERINE M. McCRACKEN
1241 East Prince Road
Tucson, Arizona 85719

CERTIFICATE OF SERVICE

I, CATHERINE M. McCRACKEN, attorney for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of December, 1988, as per the direction of the Clerk of the Supreme Court, served copies of the foregoing Petition for Writ of Certiorari on the parties hereto as follows:

On the Respondent TUCSON UNIFIED SCHOOL DISTRICT by hand delivering three (3) copies of it to its attorney of record:

William B. Hanson
Denise M. Bainton
DeCONCINI, McDONALD, BRAMMER, YETWIN
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APPENDIX A

Tucson, Unified School District
Governing Board Policy 4080

Board Policy 4080

RETIREMENT EXTENSIONS

This policy is adopted pursuant to A.R.S. § 38-759.01. Except as provided in A.R.S. § 38-759.01 and in this policy, all employees of the District who have attained or exceeded age seventy shall be retired effective the first day of the calendar month immediately following the employee's seventieth birthday. These are the procedures and standards to be followed for the continuation of employment of District employees beyond seventy.

A. Any person employed by the District may continue employment beyond age seventy if:

1. Such employee requests in writing, at least 90 calendar days in advance of the employee's birthday or extended retirement date, and not more than one year in advance of the employee's birthday or extended retirement date, that the employee be permitted to continue such employment;

2. Such employee's supervisor certifies that the employee's performance over the last twenty-four months worked has been superior and the supervisor recommends approval of the request;

3. The Superintendent or designee certifies that, after considering the employee's experience, training, employment history, and abilities, the job description, and the availability of qualified replacements, he or she has

concluded that retirement of the employee would prove injurious to the welfare of the students in general or that the employee would be difficult to replace. and recommends that the request be granted; and.

4. The Governing Board approves an extension of employment. The Governing Board may approve or deny an extension despite the supervisor's or Superintendent's recommendations.

B. The Superintendent shall promulgate Administrative Procedures for this Policy.

C. The Board hearing and vote shall be within 90 days of the original request unless the Superintendent grants a one calendar month extension of the retirement date. The hearing before the Governing Board shall be conducted in an informal manner. Evidence may be presented by the Superintendent, the employee, or by their respective legal counsel. The hearing shall be recorded and shall be transcribed on request of the Governing Board, the Superintendent, or the employee. The cost of the transcript shall be paid by the employee if requested by the employee. The hearing may be recessed and resumed on short notice.

D. The vote to grant or deny the extension shall be held in open session after a brief recommendation by the Superintendent and an opportunity for public comment. The Governing Board may deny any extension, grant an extension of from one month to one year, or may direct

the Superintendent to arrange for further evidence or recommendations and report for further proceedings. If such directions are given to the Superintendent, one month extensions shall normally be given to allow the employee to continue employment until a decision is made.

E. Any teacher whose birthday or extended retirement date falls during April, May, June, July, or August must submit the request for extension before the end of the previous calendar year. Any other employee whose birthday or extended retirement date falls during June, July or August must submit the request for extension before the end of the previous February.

ADMINISTRATIVE PROCEDURES FOR BOARD POLICY 4080

A. All requests pursuant to Policy 4080 (A) (1) shall be considered received when actually received by the Personnel Department on the form approved by the Superintendent and signed by the employee. It is the responsibility of the employee to have the request delivered to the Personnel Department; it is not the responsibility of the supervisor or any other person. Except in extreme circumstances showing manifest injustice or inequity. requests which are received late shall not be considered by the District.

B. The employee is also responsible for informing his or her supervisor of the request at the same time as the request is delivered to the Personnel Department or immediately thereafter.

C. Within approximately 18 days of the request being received by the Personnel Department. the supervisor shall set up an informal conference with the employee. giving at least 24 hours oral or written notice to the employee of the time and place. The Supervisor shall hold the informal conference to review the employee's performance over the last twenty-four months worked and the issues stated in Policy 4080 (A) (3). The supervisor may, but shall not be required by the employee, to further investigate the performance and issues stated.

D. Within approximately 21 days of the request. the supervisor shall inform the employee and the Personnel Department in writing of the following initial determinations:

1. Whether the employee's performance over the last twenty-four months worked has been superior;

2. Whether the retirement of the employee would prove injurious to the welfare of students in general;

3. Whether the employee would be difficult to replace; and,

4. Whether the supervisor supports the request.

Brief reasons shall be given for each of the four determinations. If any of the four determinations are "no", the request for extension shall be considered denied. The employee may appeal the determinations by delivering to the Personnel Department a written appeal giving brief reasons why each of the four determinations should be "yes." Said appeal shall be delivered to the Personnel Department within 35 days of the request for extension. If all four determinations are yes, the supervisor shall notify the Personnel Department in writing of said determinations. The Personnel Department shall arrange a hearing on the request for extension before the Governing Board in executive session and place it on the agenda for vote in a regular or special Board meeting.

E. Within 7 calendar days of receipt of the employee's appeal, the Personnel Department shall mail a copy to the employee with notice of the name of the Superintendent or designee who will make the determinations in Policy 4080 (A)(3), and shall provide the Superintendent or designee with a copy of such notice.

F. A conference between the employee, the supervisor and the Superintendent or his designee shall be scheduled within approximately 60 days from the date of the request. The employee shall be given approximately 7 days oral or written notice of the time and place of the conference. The conference shall be conducted in an informal, private manner. The employee or District may request that individual representatives or advisors be allowed to attend. The Superintendent or designee shall control the conference and may allow evidence, witnesses, cross-examination, discussion and argument relevant to the issues in Policy 4080 (A) or determinations in these Procedures (D) (1) through (4).

G. Within approximately 61 days from the date of the request, the Superintendent or designee shall notify in writing the address of record, the employee and the Personnel Department of the following determinations:

1. Whether the employee's performance over the last twenty-four months worked has been superior;

2. Whether the retirement of the employee would prove injurious to the welfare of students in general;

3. Whether the employee would be difficult to replace; and,

4. Whether the supervisor supports the request.

Brief reasons shall be given for each of the four determinations, and if the

employee has submitted reasons as is required to appeal from the supervisor's initial determinations, the Superintendent's reasons should in most cases directly address the employee's reasons when the Superintendent's determinations are not completely positive. If any of the four determinations are "no," the request for extension shall be considered denied.

H. The employee may appeal the determinations to the Governing Board by delivering to the Personnel Department a written appeal giving brief reasons why each of the four determinations should be "yes." Said appeal shall be delivered to the Personnel Department within 75 days of the request for extension.

I. Upon receipt of the determinations of the Superintendent, the Personnel Department shall arrange a hearing on the request before the Governing Board in executive session and have a vote on the request placed on the agenda for a regular or special meeting of the Governing Board. The hearing and vote shall be within 90 days of the original request. The employee shall be notified of the time and place of the hearing and action meetings at least 20 days before the hearing. Notice will be considered given when it is mailed.

J. The notice shall inform the employee that there will be no hearing if any of the Superintendent's determinations were negative unless an appeal is filed in accordance with the last sentence of (H) above, shall contain a copy of Policy 4080, these procedures, and the determinations of the Superintendent, and shall state that the hearing shall be on

the question of whether or not an extension should be granted in light of all issues previously raised in this policy, the prior conferences, determinations, and appeals. The Superintendent may grant a one calendar month extension of the retirement date if a hearing and vote can not be scheduled so as to occur before the retirement date. If the notice has insufficient details of the issues involved or matters asserted, the Superintendent shall furnish a more definite and detailed statement, and if justice requires, may grant a one month extension as above. If any of the Superintendent's determinations in (H) above are negative and no timely appeal is filed, the request shall be considered withdrawn, and the hearing and vote shall be cancelled.

K. 1. A final decision has been made denying a request when:

a. The Superintendent decides that the original request pursuant to Paragraph A of these Procedures has been received late and mails notice in writing to the employee that the request will not be considered;

b. The Superintendent decides that the appeal pursuant to Procedure (D) has been received late and mails notice in writing to the employee that the request will not be considered;

c. The Superintendent decides that the appeal pursuant to

Procedure (H) has been received late and mails notice in writing to the employee that the request will not be considered; or

d. The Governing Board votes to deny an extension, or grants one of a shorter length than requested and denies the remainder of the request.

2. A final decision has been made granting a request when the Governing Board votes to grant an extension, or grants one of a shorter length than requested.

REQUEST FOR EXTENSION OF EMPLOYMENT PAST AGE 70

This form implements Board Policy 4080 and the Administrative Procedures for that policy. Read the Policy and Administrative Procedures to determine when you may make this request and what other things you must do.

I, _____, currently employed
Employee Name

by T.U.S.D. as _____, at
Current Position

_____, hereby request that I be permitted to continue such employment past my 70th birthday or current extended retirement date, which is _____.
Month Day Year

I request an extension of _____ months.
1-12

I believe that my performance over the last twenty-four months worked has been superior; that considering my experience, training, employment history, and current abilities, the job description and the availability of qualified replacements, my retirement would prove injurious to the welfare of students in general or that I would be difficult to replace.

_____ _____
Date Employee Signature

- -

For Personnel Department Use Only

Received by Personnel Department

_____

Exact Date

Supervisor for Initial Determinations

_____

Name

APPENDIX B

Age Discrimination in Employment Act of 1967

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

[3236] [TITLE OF ACT]

[Sec. 1] This Act may be cited as the "Age Discrimination in Employment Act of 1967." [81 Stat. 602, not reproduced in the U.S. Code.]

[3237] STATEMENT OF FINDINGS AND PURPOSE

[3237A] [Effect of Employment Age Limits]

Sec. 2. (a) The Congress hereby finds and declares that--

(1) in the fact of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practICE, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long term unemployment with resultant deterioration of skill, morale, and employer acceptability, is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce and the free flow of goods in commerce [81 Stat. 602, 29 U.S.C. § 621(a).]

[3237B] [Purpose of Law]

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. [81 Stat. 602, 29 U.S.C. § 621 (b).]

[3238] EDUCATION AND RESEARCH PROGRAM

[3238A] [Studies to Promote Employment of Older Workers]

Sec. 3. (a) The Secretary of Labor [EEOC] shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor [EEOC] shall carry on a continuing program of education and information, under which he may, among other measures--

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative efforts the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community information and educational programs. [81 Stat. 602, 29 U.S.C. § 622 (a).]

[3238B] [Age Limit Recommendations]

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12. [81 Stat. 602, not reproduced in the 1979 Supplement to the U.S. Code.]

[3239] PROHIBITION OF AGE DISCRIMINATION

[3240] [Employers]

Sec. 4. (a) It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

[81 Stat. 603, 29 U.S.C. § 623 (a).]

[3241] [Employee Agencies]

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment or otherwise discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age. [81 Stat. 603, 29 U.S.C. § 623 (b).]

[3242] [Unions]

(c) It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of such individual's age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee as an applicant for employment, because of such individual's age;

(3) To cause or attempt to cause an employer to discriminate against an individual in violation of this section. [81 Stat. 603, 29 U.S.C. § 623 (c).]

[3243] [Reprisal for Opposing Unlawful Practices]

(d) It shall be unlawful for an employer

to discriminate against any individual, or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member, or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act. [81 Stat. 603, 29 U.S.C. § 623 (d).]

[3244] [Biased Job Ads and Referrals]

(e) It shall be unlawful for an employer, labor organization or employment agency to print, publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age. [81 Stat. 603, 29 U.S.C. § 623 (e)].

[3245] [Occupational Needs--Benefit Plans--Mandatory Retirement--Discharge for Cause]

(f) It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bone fide occupational qualification reasonably necessary to the normal

operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a work place in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such work place is located.

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12 (a) of this Act because of the age of such individual.

(3) to discharge or otherwise discipline an individual for good cause [81 Stat. 603, 29 U.S.C. § 623 (f), as amended April 6, 1978, P.L. 95-256, 92 Stat. 189, effective April 6, 1978, except that in the case of employees covered by a labor contract which was in effect on September 1, 1977, the effective date is January 1, 1980, or upon termination of such contract, whichever occurs first, and further amended October 9, 1984, P.L. 98-459, 98 Stat. 1792.]

[3245A] [Coverage of Older Workers Under Group Health Plans]

(g)(1) For purposes of this section, any employer must provide that nay employee

aged 65 or older, and any employee's spouse aged 65 and older, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of the Internal Revenue Code of 1954 [96 Stat. 353, 29 U.S.C. § 623(g) as amended July 18, 1984, P.L. 98-369, 98 Stat. 1063, effective January 1, 1985, and further amended May 1, 1986, P.L. 99-272, Section 9201(b), 100 Stat. 171, to change the age range of affected employees and employee spouses from "65 through 69" to "65 and older".]

[3245B] [Foreign Firms Controlled by U.S. Employers]

(h)(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purposes of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor

relations, and

(D) common ownership of financial control of the employer and the corporation.

[29 U.S.C. § 623(g), as added October 9, 1984, P.L. 98-459, 98 Stat. 1767, as amended May 1, 1986, P.L. 99-272, Section 9201(b)(3), 100 Stat. 171, to designate the subsection "4(h)" instead of "4(g)" as originally designated in a drafting error.]

[3245C] [Employment of Firefighters and Law Enforcement Officers]

(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge an individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

[29 U.S.C. § 623(i), added October 31, 1986, effective January 1, 1987, P.L. 99-xxx,--Stat.--, automatically repealed December 31, 1993.]

[3245D] [Employee Pension Benefit Plans]

(i)(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or year of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirements of this subsection for continue accrual of benefits under such **lan with respect to such employee during such plan year

shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 206(a)(3) of the Employee Retirement Income Security Act of 1974 and section 401 (a)(14)(C) of the Internal Revenue Code of 1986, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 or section 411(a)(3)(B) of the Internal Revenue Code of 1986, then any requriement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year sahll be treated as satisifed to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of

this subsection with respect to an employee benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the maning of section 414(q) of the Internal Revenue Code of 1986) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precludng discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of the Internal Revenue Code of 1986.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized protion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of Treasury pursuant to clause (v) of section 411(b)(1)(H) of the Internal Revenue Code of 1986 and subparagraphs (C) and (D) of section 411(b)(2) of such Code shall apply with respect to the requirements of this subsection in the smae manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 3(24)(B) of the Internal Revenue Code of 1986.

(9) For the purposes of this subsection--

(A) Ther terms 'employee pension benefit plan,' 'defined benefit plan,'

'defined contribution plan,' and 'normal retirement age' have the meanings provided such terms in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(B) The term 'compensation' has the meaning provided in section 414(s) of the Internal Revenue Code of 1986.

[29 U.S.C. § 623(i), added October 21, 1986, effective January 1, 1988, except as noted at 3219.50, P.L. 99-509, --Stat.--. Note: Due to a drafting error, Congress added this section as a second Section (4)(i) to the ADEA. See also Section (4)(i) at 3245C above.]

[3246] STUDY BY SECRETARY OF LABOR [EEOC]

[3246A] [Age limit Effects]

Sec. 5(a)(1). The Secretary of Labor [EEOC] is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include--

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by secton 12(a) of this Act to 70 years of age;

(B) a determinatin of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 12(c), relating to certain executive employees, and the exemption contained in section 12(d), relating to tenured teaching personnel.

(2) The Secretary [EEOC] may undertake the study required by paragraph (1) of this subsecton directly or by contrat or other arrangement. [81 Stat. 604, 29 U.S.C. § 624(a), as amended April 6, 1978, P.L. 95-256, 92 Stat. 192.]

[3246B] [Report on Study]

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982. [29 U.S.C. § 624(b), as added April 6, 1978, P.L. 95-256, 92 Stat. 192.]

[3247] ADMINISTRATION

[3247A] [Delegation of Authority--Cooperative Efforts]

Sec. 6. The Secretary [EEOC] shall have the power--

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee-for-service basis, as he deems necessary to assist him in the performance of his functions under this Act;

(b) to cooperate with regional, State,

local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act. [81 Stat. 604, 29 U.S.C. § 625.]

[3248] RECORDKEEPING, INVESTIGATION AND ENFORCEMENT]

[3249] [Investigations--Recordkeeping]

Sec. 7.(a) The Secretary [EEOC] shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance wtih the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211). [81 Stat. 604, 29 U.S.C. § 626(a).]

[3250] [Enforcement Procedures]

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of section 16 an 17 of the Fair Labor Standards act of 183, as amneded (29 U.S.C. 216, 217): Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be

appropraite to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforceing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary [EEOC] shall attempt to eliminate the discriminatory pracice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion. [81 Stat. 604, 29 U.S.C. § 626(b).]

[3251] [Civil Actions--Jury Trial]

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such actionshall terminate upon the commencement of an action by the Secretary [EEOC] to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a perosn shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action. [81 Stat. 604, 29 U.S.C. § 626(c), as amended April 6, 1978, P.. 95-256, 92 Stat. 190.]

[3252] [Notices of Charge]

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary [EEOC] shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion. [81 Stat. 604, 29 U.S.C. § 626(d), as amended April 6, 1978, P.. 95-256, 92 Stat. 190. The amendment made by subparagraph (1) shall take effect with respect to civil actons brought after April 6, 1978.]

[3253] [Time Limits--Conciliation Period]

(e)(1) Sections 6 and 10 of the Portal-to-Portal Act through informal methods of concilation, conference, and persuasion pursuant to subsection (b), the statute of limitations as rpovided in section 6 of the Portal-to-Portal Act of 1947 [29 U.S.C. § 255] shall be tolled, but in no event for a period in excess of one year. [81 Stat. 604, 29 U.S.C. § 626(e), as amended April 6, 1978, P.L. 95-256, 92 Stat. 190.]

[3254] NOTICES TO BE POSTED

Sec. 8. Every employer, employment agency, and labor organization shall post and

keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary [EEOC] setting forth information as the Secretary [EEOC] deems appropriate to effecuate the purposes of this Act. [81 Stat. 605, 29 U.S.C. § 627.]

[3255] RULES AND REGULATIONS

Sec. 9. In accordance with the provisions of subchapter II of chapter 5, United States Code, the Secretary of Labor, [EEOC] may issue such rules and regulations as [it] may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as [it] may find necessary and proper in the public interest. [81 Stat. 605, 29 U.S.C. § 628.]

[3256] CRIMINAL PENALTIES

Sec. 10. Whoever shall forcibly resist, oppose, impede, intimidate, or interfere, with a duly authorized respresentative of the Secretary [EEOC] while [it] is engaged in the performance of duties under this Act shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder. [81 Stat. 605, 29 U.S.C. § 629.]

[3257] DEFINITIONS

Sec. 11. For the purposes of this Act--

[3258] ["Person"]

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups

of persons. [81 Stat. 605, 29 U.S.C. § 630(a).]

[3259] ["Employer"]

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calender weeks in the current or preceding caldner year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or politcal subdivison of a State and any agency or instrumentality of a state or a politicl subdivison of a state, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States. [81 Stat. 605, 29 U.S.C. § 630(b), as amended April 8, 1974, P.L. 93-259, 88 Stat. 74.]

[3260] ["Employment Agency"]

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States. [81 Stat. 605, 29 U.S.C. § 630(c), as amended April 8, 1974, P.L. 93-259, 88 Stat. 74.]

[3261] ["Labor Organization"]

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association,

or plan so engaged in whcih employees participate and whcih exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization. [81 Stat. 605, 29 U.S.C. § 630(d).]

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hirign hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organziation composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organizations) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended, or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidary body which is representing or actively seeking to represent employees of employers within

the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body thorugh which employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international organization, which includes a labor organization engaged in an industry affecting commerce wtihin the meaning of any of the preceding paragraphs of this section. [81 Sat. 605, 29 U.S.C. § 603(e).]

[3262] ["Employee"]

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appontee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country. [81 Stat. 605, 29 U.S.C. § 630(f), as amended April 8, 1974, P.L. 93-259, 88 Stat. 74, and October 9, 1984, P.L. 98-459, 98 Stat. 1792.]

[3263] ["Commerce"]

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several Sates; or between a State and any place outside thereof; or wtihin the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof. [81 Stat. 605, 29 U.S.C. § 630(g).]

[3264] ["Industry Affecting Commerce"]

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959. [81 Stat. 605, 29 U.S.C. § 630 (h).]

[3265] ["State"]

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act. [81 Stat. 605, 29 U.S.C. § 603(i).]

[3265A] ["Firefighter"]

(j) Ther term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected wtih the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is

tranferred to a supervisory or administrative position. [29 U.S.C. § 630(j), as added October 31, 1986, effective January 1, 1987, P.L. 99-xxx, --Stat.--.]

[3265B] ["Law Enforcement Officer"]

(k) The term "law enforcement officer" means an emloyee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the a State, including an employee engaged in this activity who is tranferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in an penal institution. [29 U.S.C. § 630(k), as added October 31, 1986, effective January 1, 1987, P.L. 99-xxx, --Stat.--.]

[3266] AGE LIMITATION

[3266a] [Protected Age Range for Employees]

Sect. 12. (a). The prohibitions in this Act (except the provisions of section 4(g)) shall be limited to individuals who are at least forty years of age. [81 Stat. 607, 29 U.S.C. § 631(a), as amended April 6, 1978, P.L. 95-256, 92 Stat. 189, and May 1 , 1986, P.L. 99-272, Sect 9201(b), and P.L. 99-xxx,--Stat.--, October 31, 1986, effective January 1, 1987.]

[3266B] [Age for Federal Workers]

(b) In the case of any personnel action affecting employees or applicants for employemnt which is subject to the provisions of secton 15 of this Act, the prohibitions established in section 15 of this Act shall be

limited to individuals who are at least 40 years of age. [29 U.S.C. § 631(b), as added April 6, 1978, P.L. 95-256, 92 Stat. 189.]

[3266C] [Exclusion of Executives and Top Policymakers]

(c)(1) Nothing in this Act shall be construed to prohibit compulsory retirment of any employee who has attained 65 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000. [29 U.S.C. § 631(c)(1), as added April 6, 1978, P.L. 95-256, 92 Stat. 189, amended October 9, 1984, P.L. 98-459, 98 Stat. 1792, and October 31, 1986, effective January 1, 1987, P.L. 99-xxx, --Stat.--.]

[3266D] [Retirement Income Test for Exclusion]

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjsuted in accordance with regulations prescribed by the Secretary [EEOC], after consultation wtih the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rolloever contributions are made. [29 U.S.C. § 631(c)(2), as added April 6, 1978, P.L. 95-256, 92 Stat. 189.]

[3266E] [Temporary Exclusion for Tenured Faculty]

(d) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attaned 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965). [29 U.S.C. § 631(d), as added October 31, 1986, effective January 1, 1987, P.L. 99-xxx, --Stat.--, and to be automatically repealed December 31, 1993.]

[3267] ANNUAL REPORT

Sec. 13. The Secretary [EEOC] shall submit annual in January a report to the Congress covering his [its] activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he [it] may find advisable. Such report shall contain an evaulation and appraisal by the Secretary [EEOC] fo the effect of the minimum and maximum ages established by this Act, together wtih his [its] recommendaitons to the Congress. In making such evaluation and appraisal, the Secretary [EEOC] shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its proivsions, and such other factors as he [it] may deem pertinent. [81 Stat. 607, 29 U.S.C. § 632.]

[3268] FEDERAL-STATE RELATIONSHIP

[3268A] [Recognition of State Authority]

Sec. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supercede any State action. [81 Stat. 607, 29 U.S.C. § 633(a).]

[3268B] [Time Alloted for State Proceedings]

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment becasue of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day operiod shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requiement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registere mail to the appropriate State authority. [81 Stat. 607, 29 U.S.C. § 633(b).]

[3268C] FEDERAL EMPLOYEES]

[3268D] [Employees Covered]

Sec. 15. (a) All personnel actions affecting employees or applicants for

employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United states) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those unites of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age. [29 U.S.C. § 633(a), as added April 8, 1974, P.L. 93-259, 88 Stat. 74, and further amended April 6, 1978, P.L. 95-256, 92 Stat. 191.]

[3268E] [Enforcement Responsibility]

(b) Except as otherwise provided in the subsection, the Civil Service Commission [EEOC]is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission [EEOC] shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission [EEOC] shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from

each such department, agency, or unit;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission [EEOC] which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission [EEOC] shall be exercised by the Librarian of Congress. [29 U.S.C. §633a(b), as added April 8, 1974, P.L. 93-259,88 Stat.74.]

[3268F] [Individual Civil Action]

(c) Any persons aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act. [29 U.S.C. § 633a(c), as added April 8, 1974, P.L. 93-259, 88 Stat.74.]

[3268G] [Notices of Complaint)

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice. [29 U.S.C. § 633a(d), as added April 8, 1974, P.L. 93-259, 88 Stat. 74.]

[3268H] [Responsibility of Government Officials]

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law. [29 U.S.C. §633a(e), as added April 8, 1974, P.L. 93-259, 88 stat. 74.]

[3268I] [Restrictive Application]

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section. [29 U.S.C. § 633a(f), as added April 6, 1978, P.L. 95-256, 92 Stat. 74.]

[3268J] [Studies and Reports]

(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978.

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980. [29 U.S.C. § 633a(g), as added April 6, 1978, P.L. 95-256, 92 Stat. 191]

[3269] EFFECTIVE DATE

Sec. 16. this Act shall become effective one hundred and eighty days after enactment, except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date enactment the Secretary of Labor is authorized to issue such rules and regulations as may be necessary to carry out its provision. [81 Stat. 608, as amended April 8, 1974, P.L. 93-259, 88 Stat. 74, not reproduced in U.S. Code.]

[3270] APPROPRIATIONS

Sec. 17. There are hereby authorized to be appropriated such sums as may be necessary to carry out this Act. [81 Stat. 608, 29 U.S.C. §634, as amended April 8, 1974, P.L. 93-259, 88 Stat. 74, and further amended April 6, 1978, P.L. 95-256, 92Stat. 193.]

APPENDIX C

A.R.S. §38-759.01

§ 38-759.01. Employment beyond age seventy; retirement contributions and benefits; exceptions

A. The department of administration shall adopt rules prescribing the procedures and standards to be followed for the continuation of employment of state employees beyond age seventy. Each political subdivision of the state shall adopt rules prescribing the procedures and standards to be followed for the continuation of employment beyond age seventy for the officers and employees of such political subdivision.

B. Any person employed as provided in this section as an officer or employee of the state may continue employment beyond age seventy if:

1. Such officer or employee requests in writing, six months prior to such person's attainment of age seventy, that such person be permitted to continue such employment, except that if such person attains age seventy earlier than six months after this section becomes operative, then such officer or employee shall submit such request within such earlier time as prescribed by rules and regulations adopted by the department of administration.

2. Such officer or employee is certified by such person's appointing authority by reason of experience and training to perform the duties of such person's position and the appointing

authority approves the request for continued employment.

3. Such officer's or employee's performance is certified to be satisfactory by such person's appointing authority.

4. The department of administration approves such request pursuant to its rules and regulations governing continued employment after age seventy.

C. The department of administration shall not approve a request for a term of continued employment of state employees exceeding one year but may approve as many annual requests for continued employment as it deems advisable.

D. The provision of this section shall be retroactively available to state and political subdivision officers and employees for possible continuation of employment beyond age seventy:

1. By any person employed as an officer or employee of the state of a political subdivision of the state on June 30, 1974, until such person attains age seventy, provided such employment is continuous. During such continued employment, the employer and such officer or employee shall make contributions, based on such person's current salary, to the retirement system or plan or an optional retirement program established pursuant to § 15-1628, of which such person is a

member or participant, and such person shall accrue benefits for retirement purposes for such periods of continued employment. The rates of contributions and benefits accrued for retirement purposes shall be the same as provided for other officers or employees of such employer who are members or participants of the same retirement system, plan or optional retirement program.

2. By any person who commences or resumes employment with state or a political subdivision of the state on or after July 1, 1974, and has not attained age seventy on or before commencing or resuming such employment. During such continued employment, after age seventy, such officer or employee shall not make contributions from salary to any retirement system, plan or optional retirement program based on such continued employment and shall not accrue any benefits for any such period of continued employment.

APPENDIX D

A.R.S. § 38-781.36

§ 38-781.36. Employment beyond age seventy; retirement contributions and benefits; exceptions

A. The personnel board shall adopt rules prescribing the procedures and standards to be followed for the continuation of employment of state employees beyond age seventy. Each political subdivision of the state shall adopt rules prescribing the procedures and standards to be followed for the continuation of employment beyond age seventy for the officers and employees of such political subdivision.

B. Any person employed as provided in this section as an officer or employee of the state may continue employment beyond age seventy if:

1. Such officer or employee requests in writing, six months prior to such person's seventieth birthday, what he or she be permitted to continue such employment, except that if such person attains age seventy earlier than six months after this section becomes operative, then such officer or employee shall submit such request with such earlier time as prescribed by rules and regulations adopted by the personnel board.

2. Such officer or employee is certified by his or her appointing authority as specially fitted by reason of experience and training to perform the duties of his or her position and the appointing authority approves the request for continued employment.

3. The personnel board approves such request pursuant to its rules and regulations governing continued employment after age seventy.

C. The personnel board shall not approve a request for a term of continued employment of state employees exceeding one year but may approve as many annual requests for continued employment as it deems advisable.

D. The provisions of this section shall be retroactively available to state and political subdivision officers and employees for possible continuation of employment beyond age seventy:

1. By any person employed as an officer employee of the state of a political subdivision of the state on June 30, 1974, until such person attains age seventy, provided such employment is continuous. During such continued employment, the employer and such officer or employee shall make contributions, based on such person's current salary, to the retirement system or plan or an optional retirement program established pursuant to § 15-1628, of which such person is a member or participant, and such person is a member or participant, and such shall accrue benefits for retirement purposes for such periods of continued employment. The rates of contributions and benefits accrued for retirement purposes shall be the same as provided for

other officers or employees of such employer who are members or participants of the same retirement system, plan or optional retirement program.

2. By any person who commences or resumes employment with the state of a political subdivision of the state on or after July 1, 1974, and has not attained age seventy on or before commencing or resuming such employment. During such continued employment, after age seventy, such officer or employee shall not make contributions from salary to any retirement system, plan or optional retirement program based on such continued employment and shall not accrue any retirement benefits for any such period of continued employment.

APPENDIX E

1986 Amendment to the Age Discrimination in Employment Act of 1967

AGE DISCRIMINATION IN EMPLOYMENT AMENDMENTS OF 1986

[3218]

(Act of October 31, 1986, P.L. 99-xxx, --Stat.--, generally effective January 1, 1987.)

AN ACT to amend the Age Discrimination in Employment Act of 1967 to remove the maximum age limitation applicable to employees who are protected under such Act, and for other purposes.

[3218.05] SHORT TITLE

Sec 1. This Act may be cited as the "Age Discrimination in Employment Amendments of 1986".

[3218.10] AMENDMENTS RELATING TO MAXIMUM AGE

[3218.15] Coverage Under Group Health Plans

Sec. 2. (a) Subsection (g)(1) of section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(g)(1), as added by section 116(a) of the Tax Equity and Fiscal Responsibility Act of 1982, is amended by striking out "through 69" each place it appears and inserting in lieu thereof "or older". [Note: Group health plan coverage was previously extended to individuals beyond age 69 by P.L. 99-272, 100 Stat. 171. See 3245A.]

[3218.20] Technical Amendment

(b) Subsection (g) of section 4 of the Age Discrimination in Employment Act of 1967,

as added by section 802(b)(2) of the Older Americans Act Amendments of 1984, is amended by striking out "(g)(1)" and inserting in lieu thereof "(h)(1)". [Note The technical amendments made by this subsection were previously made by P.L. 99-272, 100 Stat. 171. See 3245B.

[3218.25] **Removal of Maximum Age Limitation**

(c) [the amendments dealing with the removal of the ADEA's upper age cap are reflected in place at 3266A and 3266C.]

[3218.30] **EMPLOYMENT AS FIREFIGHTER OR LAW ENFORCEMENT OFFICER**

Sec. 3. (a) [The amendments dealing with the employment of firefighters and law enforcement officers are reflected in place at 3245C.]

(b) Termination Provision.--The amendments made by subsection (a) of this section is repealed December 31, 1993.

[3218.35] **DEFINITIONS**

Sec. 4. [The amendments dealing with the definitions of "firefighter" and "law enforcement officer" are reflected in place at 3265A and 3265B, respectively.]

[3218.40] **STUDY AND PROPOSED GUIDELINES RELATING TO POLICE OFFICERS AND FIREFIGHTERS**

Sec. 5. (a) Study.-- Not later than 4 years after the date of enactment of this Act, the Secretary of Labor and the Equal

Employment Opportunity Commission, jointly, shall--

(1) conduct a study--

(A) to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs,

(B) if such tests are found to be valid measurements of such ability and competency, to determine which particular types of tests most effectively measure such ability and competency, and

(C) to develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy, and

(2) submit a report to the Speaker of the House of Representatives and the President pro tempore of the Senate that includes--

(A) a description of the results of such study, and

(B) a statement of the recommendations developed under paragraph (1)(C).

(b) Consultation Requirement. --- The Secretary of Labor and the Equal Employment Opportunity Commission shall, during the conduct of the study required under subsection (a) and prior to the development of recommendations under paragraph (1)(C),

consult with the United States Fire Administration, the Federal Emergency Management Agency, organizations representing law enforcement officers, firefighters, and their employers, and organizations representing older Americans.

(c) Proposed Guidelines. --- Not later than 5 years after the date of the enactment of this Act, the Equal Employment Opportunity Commission shall propose, in accordance with subchapter II of chapter 5 of title 5 of the United States Code, guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs.

[3218.45] SPECIAL RULE FOR TENURED FACULTY

[3218.50] Special Rule

Sec. 6. (a) [The amendments relating to the temporary exception for tenured faculty are reflected in place at 3266E.]

{ 3218.55] Termination Provision

(b) The amendment made by subsection (a) of this section is repealed December 31, 1993.

[3218.60] Study required

(c)(1) The Equal Employment Opportunity Commission shall, not later than 12 months after the date of enactment of this Act, enter into an agreement with the National Academy of Sciences for the conduct of a study to analyze the potential consequences of the elimination of mandatory retirement on institutions of higher education.

(2) The study required by paragraph (1) of this subsection shall be conducted under the general supervision of the National Academy of Sciences by a study panel composed of 9 members. The study panel shall consist of ---

(A) 4 members who shall be administrators at institutions of higher education selected by the National Academy of Sciences after consultation with the American Council of Education, the Association of American Universities, and the National Association of State Universities and Land Grant Colleges;

(B) 4 members who shall be teachers or retired teachers at institutions of higher education who do not serve in an administrative capacity at such institutions), selected by the National Academy of Sciences after consultation with the American Federation of Teachers, the National Education Association, the American Association of University Professors, and the American Association of Retired Persons; and

(C) one member selected by the National Academy of Sciences.

(3) The results of the study shall be reported, with recommendations, to the President and to the Congress not later than 5 years after the date of enactment of this Act.

(4) The expenses of the study required by this subsection shall be paid from funds

available to the Equal Employment Opportunity Commission.

[3218.65] EFFECTIVE DATE; APPLICATION OF AMENDMENTS

[3218.70] In General

Sec. 7. (a) Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on January 1, 1987, except that with respect to any employee who is subject to a collective-bargaining agreement---

(1) which is in effect on June 30, 1986,

(2) which terminates after January 1, 1987,

(3) any provision of which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(4), and

(4) which contains any provision that would be superseded by such amendments, but for the operation of this section,

such amendments shall not apply until the termination of such collective bargaining agreement on January 1, 1990, whichever occurs first.

[3218.75] Effect on Existing Causes of Action

(b) The amendments made by section 3 and 4 of this Act shall not apply with respect to

any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987.

APPENDIX F

Judgment dated January 30, 1987

ARIZONA SUPERIOR COURT

PIMA COUNTY

CASE NO. 213815
JUDGMENT

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Plaintiffs,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, a political subdivision of the State of Arizona, et al.,

Defendants.

This action having been submitted by the parties on an Agreed Statement of Facts, and the Court having examined the pleadings and memoranda of the parties, and having heard all argument, and having entered Findings of Fact and Conclusions of Law, makes the following judgment:

1. That judgment is hereby entered for

Defendants and against Plaintiffs, and that Plaintiffs take nothing by their Complaint;

2. That the findings of Fact and Conclusions of Law entered this 30th day of January, 1987, is hereby incorporated into, and made a part of this Judgment;

3. That Defendants are awarded their reasonable attorneys' fees in the amount of Ten Thousand Dollars ($10,000.00) and costs incurred in the amount of Seven Hundred Three Dollars and Fifty Cents ($703.50) from and against Plaintiffs.

DATED this 30th day of January, 1987.

The Honorable Michael D. Alfred
Judge Pro Tem
Arizona Superior Court

APPENDIX G

Superior Court Minute Entry dated
March 18, 1987

ARIZONA SUPERIOR COURT

PIMA COUNTY

CASE NO. 213815
March 18, 1987

JOHN W. WILLIAMS and WINIFRED WILLIAMS, et ux.,

Plaintiffs,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, etc., et al.,

Defendants.

MINUTE ENTRY

UNDER-ADVISEMENT RULING:

IT IS ORDERED that Plaintiffs' Motion for New Trial and Motion for Reconsideration of Award of Attorney's Fees are DENIED.

cc: Hon. Michael D. Alfred
Catherine M. McCracken, Esq. (Busby & McCracken)
Denise M. Bainton, Esq. and William B.

Hanson, Esq. (DeConcini, McDonald, et al.)
Under-Advisement Clerk
\wordperf\misc\minute.wil/rb

APPENDIX H

Opinion dated December 10, 1987

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

---

2 CA-CV 87-0182
Department A
OPINION

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Plaintiffs/Appellants,

v.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, a political subdivision of the State of Arizona; THOMAS J. CASTILLO, EVA BACAL, THOMAS WRIGHT, LAURA ALMQUIST, RAUL GRIJALVA, MERRILL GRANT, in their capacities as members of the School Board TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY,

Defendants/Appellees.

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 213815

Honorable Michael D. Alfred
Judge Pro Tempore

AFFIRMED

BUSBY & McCRACKEN, P.C.
By Catherine M. McCracken
and Richard B. Biggs Tucson
Attorneys for Plaintiffs/Appellants

DECONCINI, McDONALD, BRAMMER, YETWIN, LACY & ZIMMERMAN, P.C.
By Denise M. Bainton
and William B. Hanson Tucson

Attorneys for Defendants/Appellees

L A C A G N I N A, Chief Judge.

John W. Williams appeals the denial of his motion for new trial following a judgment in favor of Tucson Unified School District including an award of attorneys' fees. The trial court affirmed the district's denial of Williams' application for continued employment beyond age 70. Williams contends that:

1. The 1986 amendment to the Age Discrimination and Employment Act (the Act), 29 U.S.C.A. §§ 621-634, effective January 1, 1987, which makes mandatory retirement at age 70 unlawful, should be applied to Williams' 1983 termination.

2. The district's Board Policy 4080, the procedure for extension of employment beyond age 70, as adopted and as implemented in this case, violated Williams' constitutional rights to equal protection and due process.

3. The district's decision to deny Williams' request for extension of employment was arbitrary, capricious and an abuse of its discretion.

4. Board Policy 4080 was not legally adopted by the board because it was not certified and filed with the secretary of state pursuant to A.R.S. §41-1001.

5. The trial court abused its discretion by awarding attorney's fees to the district and failing to award Williams his attorneys' fees.

We affirm.

STIPULATED FACTS

William was a continuing teacher in the

district employed for 25 years, including the 1981-82 and 1982-83 school years, as a guidance counselor at Tucson High School. Anticipating his seventieth birthday in April 1983, Williams inquired in November 1982 about the procedure for obtaining approval to continue his employment beyond age 70. He received a reply in a letter dated November 15, 1982, stating that the district was in the process of developing such a procedure. At the time of Williams' inquiry, the policy that pertained to retirement was Board Policy 4080, which upon legal review had been found not to be in compliance with the requirements of the Arizona retirement statutes, A.R.S. §§ 38-759 and 759.01. Revisions to Board Policy 4080 were submitted to the board and adopted at a meeting on January 4, 1983. Board Policy 4080 was not certified and filed with the secretary of state.

On January 26, 1983, Williams was

informed that the board had approved a procedure for extension of employment beyond age 70 and was given a copy of revised Board Policy 4080 and an application for extension of employment. On February 3, 1983, the board received Williams' request for extension of employment made pursuant to Board Policy 4080. His application was review by his supervisor and a designee of the superintendent, both of whom decided not to recommend Williams for extended employment. Pursuant to administrative procedures set forth in Board Policy 4080, Williams appealed the decision to the board. On April 12, 1983, Williams was informed by the district's superintendent of the board's decision not to offer him a contract for the 1983-84 school year. On August 9, 1983, the board held a de novo hearing on Williams' request for extension of employment at which counsel for Williams and the school administration presented testimony

and extensive arguments. At the August 23, 1983 board meeting, Williams' request for extension of employment beyond age 70 was denied. Williams' motion for reconsideration was also denied by the board.

In 1978, Williams had requested and received an extension of employment beyond age 65, at which time the requirements existing under the former version of Board Policy 4080 were limited to 1) whether his leaving would be injurious to students in general, and 2) whether he was replaceable. Between 1978 and November 1982, no other district employee had sought to extend his or her normal retirement date. At the time of Williams' retirement, he was the only 70-year-old district employee.

APPLICATION OF AGE DISCRIMINATION ACT AMENDMENT

Both sides agree that the amendment, 29 U.S.C.A. § 631(a) (West Supp. 1987), which removes the maximum age limitation of those employees who may bring claims under the Act,

applies only to cases pending on the effective date of the amendment, January 1, 1987. Williams argues that his claim was pending at the time the amendment became effective and that the language of the Act itself required immediate application to the facts of his case. In addition, Williams argues that this court is required to apply the law as it exists at the time the court renders its appellate decision.

The district argues that Williams was lawfully retired prior to the effective date of the amendment. It also argues that the amendment does not provide a new remedy or procedure but instead makes unlawful what was previously lawful. Finally, the district argues that Williams does not have an existing claim because he never filed a claim under the Act and was not working when the amendment became effective. We agree with the district's arguments.

Under the amendment to the Act, mandatory retirement because of age is generally prohibited. Prior to the amendment and at the time Williams applied for extension of his employment, the district's action was lawful under the provisions of the Act. The change in the Act does not merely provide a new remedy for an existing claim, see Bradley v. School Board of City of Richmond, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); nor is it merely a procedural change, see United States v. Alabama, 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960). The amendment effected a substantive change in the law. Williams never filed a claim under the Act, and he is not entitled to its application.

CONSTITUTIONAL CLAIMS

Williams argues that Board Policy 4080 (now repealed) as it was adopted and implemented in his case, violated his equal protection and due process rights. He argues

that the required showing of superior performance for the two years prior to application, proof that he was difficult to replace, and that his leaving would be injurious to the students were factors subject to strict scrutiny, age being a "quasi-suspect class," and were factors that were vague by failing to give him fair warning. We disagree.

It is undisputed that two of the three factors existed under the policy which was in effect in 1978 when Williams applied for extension of employment at age 65. Age is not a suspect class; therefore, the district is merely required to show that there is a rational basis for its action in requiring the three factors to be proven in order to justify continuation of employment beyond age 70. Lewis v. Tucson School District No. 1, 23 Ariz. App. 154, 531 P.2d 199, cert. denied, 423 U.S. 864 (1975) (rational basis exists

for required showing that 1) applicant is difficult to replace, and 2) applicant's termination would be injurious to general welfare of the students). Regarding the third requirement of superior performance, Williams failed to disprove a connection between that factor and the basis advanced for it, namely the district's ability to continue paying its highest salaries only to its best personnel. See Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).

Regarding his due process claims, the requirements set forth in Board Policy 4080 are not vague, as illustrated by Williams' testimony at the hearings. He did not have difficulty in defining the words "superior performance," "injury," or "replaceable" in the context of presenting witnesses to support his claim that he met all three requirements. See Planned Parenthood of Central and Northern Arizona v. Arizona, 718 F.2d 938, 948 (9th

Cir. 1983). His due process rights were not violated in this case.

REVIEW OF THE BOARD'S DECISION

A. Substantial Evidence

On appeal from an administrative agency decision, the scope of review by the trial court and an appellate court is limited to a determination of whether the agency acted arbitrarily, capriciously or in abuse of its discretion. DeGroot v. Arizona Racing Commission, 141 Ariz. 331, 686 P.2d 1301 (App. 1984); Schmitz v. Arizona State Board of Dental Examiners, 141 Ariz. 37, 684 P.2d 918 (App. 1984). Neither a trial court nor an appellate court may weigh the evidence but must affirm the agency's decision if there is substantial evidence to support it. Maricopa County v. Gottsponer, 150 Ariz. 367, 723 P.2d 716 (App. 1986); Evans v. State, ex rel. Arizona Corporation Commission, 131 Ariz. 569, 643 P.2d 14 (App.), cert denied, 459 U.S. 808

(1982). Substantial evidence exists even if two inconsistent factual conclusions are supported by the record when the agency elects either possible conclusion. Howard v. Nicholls, 127 Ariz. 383, 621 P.2d 292 (App. 1980); Webster v. State Board of Regents, 123 Ariz. 363, 599 P.2d 816 (App. 1979). In this case, there was substantial evidence to support the board's conclusion that Williams failed to meet any of the three requirements under Board Policy 4080. We affirm that holding.

B. Authority in Enacting 4080

Arizona Revised Statutes § 38-781.36(A) (now repealed) required the board to adopt rules prescribing the procedure and standards to be followed for continuing employment of an employee beyond age 70. The board's adoption of Board Policy 4080 is not in conflict with the provision of this statute, nor does the statute require the board to adopt a

"satisfactory performance" standard as required in § 38-759.01(B)(3), which applies to state employees. We also reject Williams' argument that the board acted arbitrarily and capriciously by not having a proper policy in existence when Williams initially requested an extension of employment. Finally, the district was not required to file the policy with the secretary of state because it is not a state agency within the meaning of former A.R.S. § 41-1004(A).

c. Evidentiary Rulings

The board's decision to exclude certain cumulative testimony (as to Williams' superior performance as a counselor) was within its discretion. See M. Udall and J. Livermore, Arizona Practice: Law of Evidence § 82 at 168 n.13 (1982 ed.). The same discretion allows the board as factfinder to exclude irrelevant testimony (evidence of Williams' job as ticket-taker for the university or evidence of

his character in the community). See M. Udall and J. Livermore, supra, § 81 at 163.

ATTORNEYS' FEES

The trial court's award of attorneys' fees under A.R.S. § 12-341.01(A) is discretionary, not reviewable by this court if the record contains a reasonable basis for the exercise of that discretion. Associated Indemnity Corp. v. Warner, 143 Ariz. 567, 694 P.2d 1181 (1985), quoting Jones v. Queen Insurance Co., 76 Ariz. 212, 262 P.2d 250 (1953); Wheel Estate Corp. v. Webb, 139 Ariz. 506, 679 P.2d 529 (App. 1983); Grand Real Estate, Inc. v. Sirignano, 139 Ariz. 8, 676 P.2d 642 (App. 1983). We find no abuse of discretion in this case.

The school district is awarded attorneys' fees on appeal, upon filing the proper affidavits pursuant to Rule 21(c), Ariz. R. Civ. App. P., 17A A.R.S.

MICHAEL A. LACAGNINA, Chief Judge

CONCURRING:

JAMES D. HATHAWAY, Judge

LAWRENCE HOWARD, Presiding Judge

APPENDIX I

Arizona Supreme Court Order dated
September 21, 1988

SUPREME COURT

STATE OF ARIZONA

201 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone (602) 255-4536

September 21, 1988

RE: JOHN W. WILLIAMS/WINIFRED WILLIAMS vs. TUCSON UNIFIED SCHOOL DISTRICT NO. 1/THOMAS CASTILLO et al

GREETING:

Following action was taken by the Supreme Court of the State of Arizona on September 29, 1988, in regard to the above-referenced cause:

ORDERED: Petition for review [Appellants Williams et ux] = DENIED.

FURTHER ORDERED: Motion for Review of Appellant's Objections to the Award of Attorney's Fees [Appellants Williams et ux] = DENIED.

FURTHER ORDERED: Motion Requesting Permission to reply to Appellees' Response to appellants' request for Review, and to Appellees' Response to Appellants' Request for review of

Record returned to the court of appeals, Division Two, Tucson, This 21st day of September, 1988.

DAVID R. COLE, Clerk

TO:

Catherine M. McCracken, Esq., Busby & McCracken, 1241 East Prince Road, Tucson, AZ 85719

Denise M. Bainton, Esq., William B. Hansen, Esq., DeConcini McDonald Brammer, Yetwin Lacy & Zimmerman, 2525 East Broadway Blvd., Suite 200, Tucson, AZ 85716-5303

Joyce A. Goldsmith, Clerk Court of Appeals, Division Two, 416 W. Congress, Tucson, AZ 85701

(2)

FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1120

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1988

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, a political subdivision of the State of Arizona; THOMAS J. CASTILLO, EVA BACAL, THOMAS WRIGHT, LAURA ALMQUIST, RAUL GRIJALVA, MERRILL GRANT, in their capacities as members of the School Board TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Denise M. Bainton
William B. Hanson
DeCONCINI, McDONALD, BRAMMER, YETWIN & LACY, P.C.
2525 East Broadway Blvd., Suite 200
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(602) 322-5000
Attorneys for Respondent

39pp

NO. 88-1120

IN THE SUPREME COURT OF THE

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OCTOBER TERM, 1988

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Petitioners,

vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Denise M. Bainton
William B. Hanson
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2525 East Broadway Blvd., Suite 200
Tucson, Arizona 85716-5303
(602) 322-5000
Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether an amendment to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("the ADEA"), which removed the maximum age covered by the ADEA, and which became effective on January 1, 1987, should be applied retroactively to a person who was mandatorily retired in 1983 and who never filed a lawsuit under the ADEA.

2. Whether a school district policy (now repealed) which required an employee, before being permitted to continue his employment past the state's mandatory retirement age, to show that (a) his performance over the 24 months preceding retirement was superior, (b) his retirement would prove injurious to the welfare of students in general, and c) he would be difficult to replace, was so vague that his lawyer had no notice of what she was required to show at a hearing before the district's Governing Board.

LIST OF PARTIES

Pursuant to Supreme Court Rule of Practice 40.3, Respondents Thomas J. Castillo, Thomas Wright, Laura Almquist, Raul Grijalva and Merrill Grant, who were public officers and employees and parties to the proceedings below in their official capacities, and who have ceased to hold their public offices, should be removed from this case and the following parties substituted: Susan S. DeArmond, Robert A. Strauss, Joel T. Ireland, Sylvia Campoy and Paul D. Houston. Eva Bacal who was a party in her official capacity to the proceedings below still holds her office and, therefore, is a party to these proceedings.

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NO.88-1120

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1988

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, a political subdivision of the State of Arizona; THOMAS J. CASTILLO, EVA BACAL, THOMAS WRIGHT, LAURA ALMQUIST, RAUL GRIJALVA, MERRILL GRANT, in their capacities as members of the School Board TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY,

Respondents.

==========

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Tucson Unified School District No. 1 of Pima County and the members of its governing board and its superintendent (hereinafter collectively "TUSD") request this Court to deny the Petition for Writ of Certiorari seeking

review of the decision of the Arizona Court of Appeals, Division Two, in this case.

RESPONDENTS' SUPPLEMENTAL STATEMENT OF FACTS

The facts of this case are simple. Petitioner John Williams ("Williams") was a counselor, employed by Tucson Unified School District No. 1 of Pima County, Arizona ("TUSD"). Williams turned seventy years old in 1983. Arizona law at the time provided for mandatory retirement of teachers at age seventy, and required political subdivisions of the state, such as TUSD, to have a process by which such employees could request to continue their employment. When Williams inquired about an extension of his employment beyond the contract year in which he turned seventy, counsel for TUSD discovered that TUSD's existing policy on continuation of employment did not comport with current state law. As a result, the TUSD Governing Board ("the Board") adopted new Policy 4080 ("the Policy" or "Policy

4080") and informed Williams of its adoption.

Williams applied for continued employment pursuant to the Policy. His application was denied at the administrative level. He then requested and received a hearing before the Board. At the hearing, Williams was represented by counsel who called witnesses, cross-examined the administration's witnesses, introduced exhibits, and argued to the Board. The Board denied Williams' application.

Williams then filed a lawsuit. His complaint alleged various contractual, constitutional and state law violations, but never mentioned the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., ("ADEA"). After judgment was granted for TUSD and against Williams, including an award to TUSD of $10,000.00 for attorneys' fees, Williams requested reconsideration, relying in part on a then-recent amendment to the ADEA. His motion for reconsideration was denied. He then appealed to the Arizona

Court of Appeals. That court affirmed, and awarded attorneys' fees to TUSD on appeal. Williams moved for reconsideration, which was denied. He then petitioned for review in the Arizona Supreme Court, which was denied.

Williams now petitions this Court for a Writ of Certiorari to the Arizona Supreme Court ("Petition"). Because Williams' Petition "summarizes" almost every argument he made in the Arizona Court of Appeals and the trial court (see Petition ("Pet.") at 10-11 and 14-39), it is not absolutely clear which issues he is attempting to raise in this Court. TUSD, however, generally will ignore any extraneous issues that are discussed in Williams' "Statement of the Case," and will assume that the only issues on which he is seeking this Court's review are those which are set forth in the "Questions Presented for Review" portion of his Petition. Those issues, briefly stated, are 1) whether the Arizona Court of Appeals was incorrect as a matter of federal law

when it refused to apply a 1986 ADEA amendment retroactively to Williams and 2) whether TUSD's Policy 4080 (now repealed) was so vague that it denied Williams due process of law. The answer to both questions is "no."

WILLIAMS' PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

In an attempt to persuade this Court that adequate reasons are present which require review of the Arizona Court of Appeals' decision, Williams argues that the Court of Appeals' decision was "contrary to applicable U.S. Supreme Court decisions," Pet. at 40, and that "interpretations set forth in lower court opinions...have not been specifically espoused by the United States Supreme Court." Id. The Arizona Court of Appeals did not misapply this Court's decisions. In addition, merely because lower federal courts have interpreted something (exactly what is not made clear in Williams' Petition) in ways not "specifically espoused" by this Court is an insufficient reason for this Court to

grant review. The issue of the retroactive application of the ADEA amendments to a man who never even filed suit under the ADEA is unlikely to recur and is of no special legal significance warranting review by this Court. Moreover, whether or not words such as "superior" in a local school district's employment policy (which policy no longer exists) are unconstitutionally vague is not the kind of issue that warrants this Court's attention. An analysis of Williams' arguments reveals that there are no special or important, much less substantial, reasons indicating that review by this Court is either necessary or appropriate.

A. THE ARIZONA COURT OF APPEALS WAS CORRECT WHEN IT REFUSED TO APPLY THE 1986 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT RETROACTIVELY TO INVALIDATE AN ACT THAT WAS LAWFUL WHEN UNDERTAKEN.

In 1983, after a full adversarial hearing, the TUSD Governing Board denied Williams' application for continued employment pursuant to its Policy and state law. Williams was 70 years old. At the time, the ADEA did not apply to persons age

70 or older. 29 U.S.C. § 631(a). Three years later in November, 1986, Congress amended the ADEA. P.L. 99-592. The amendments took effect on January 1, 1987, with certain exceptions not applicable to this case. Id. § 7. The ADEA now applies to all persons age 40 and over, with no upper limit. Id. § 2(c). Mandatory retirement because of age generally is now prohibited. Williams wants the amendment applied to him.

Williams never alleged a violation of the ADEA in his complaint. Nevertheless, he argued to the trial court that he had a "pending case" within the meaning of this Court's precedents and that therefore, the ADEA amendment should be applied anyway, so he would get his job back, with back pay. The Arizona courts did not agree.

This Court has addressed the issue of the retroactive application of federal law to pending cases three times in detailed opinions. United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Thorpe

v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); and Bradley v. Richmond School Board, 416 U.S. 696 (1974). Williams says that the Arizona Court of Appeals misapplied these cases. Williams is wrong.

In this Court's cases on retroactivity, either the plaintiffs had a pending case under the old law when the law was amended, or the new legislation provided only a new remedy. None of this Court's "retroactivity" cases made an act that was lawful when done unlawful because of the new law. For example, The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) involved the condemnation of a French vessel. The Court applied a new convention with France, which stated that all property that had not yet been "definitively condemned" on the date the convention was signed was to be returned to its owner. Id. at 107 (emphasis in original). In The Schooner Peggy, the United States had a "pending case" under a law that was superseded by the convention.

When the convention was adopted, the vessel at issue had not yet been "definitively condemned." John Williams would like this Court to apply the ADEA amendments as if they read, "any employee who has not been definitively retired shall be reinstated." The ADEA, of course, says no such thing. John Williams was lawfully retired prior to the ADEA amendment. The Schooner Peggy does not apply.

Williams' cited cases "applying" The Schooner Peggy (see Pet. at 41-42) have nothing to do with the issues in this case. Dinsmore v. Southern Express Co., 183 U.S. 115 (1901), held that because a statutory change removed the basis for a regulatory commission's order, an injunction against its enforcement was no longer necessary. In Watts, Watts & Co. v. Unione Australiaca, 248 U.S. 9 (1918), the Court cited The Schooner Peggy as authority for accepting jurisdiction in a discretionary jurisdiction case. Id. at 21. The supervening change requiring the Court to accept jurisdiction

was the fact that the United States and Austria-Hungary were at war. Id. Crozier v. Krupp, 224 U.S. 290 (1912), held that because there was a new remedy at law, an injunction was not necessary. Ziffrin, Inc. v. United States, 318 U.S. 73 (1943), held that a change in law pending an administrative hearing must be followed in granting or denying permits for future acts. Id. at 78. These cases, therefore, have no applicability to the facts in our case.

This Court's next major retroactivity case, Thorpe v. Housing Authority, 393 U.S. 268 (1969), involved the eviction of a tenant from federally funded housing. The tenant had argued that her eviction without due process violated the fifth amendment. New eviction procedures, promulgated while the case was pending, provided a due process remedy. This Court stated that the new procedures were to be applied before evicting any tenant, including the plaintiff, still residing in the housing. Id. at 283 (emphasis added). Our case is different.

The ADEA amendments are not procedural and Williams is not "still on the job." Therefore, Thorpe does not have any application to the present situation.

The next major retroactivity case was Bradley v. Richmond School Board, 416 U.S. 696 (1974). Bradley affirmed and explained the rule that, with certain important exceptions, new legislation is to be applied to pending cases. For reasons that are difficult to explain, however, statements in this Court's cases both before and after Bradley appear not to apply this rule. For example, four months before Bradley was decided, this Court addressed the issue of the mandatory termination provisions of two school boards' maternity regulations. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). The Court pointed out that during the pendency of the case, Title VII of the 1964 Civil Rights Act was amended. Id. at 638 n. 8. The Court then stated:

> While the statutory amendments and the administrative regulations

> are, of course, inapplicable to the cases now before us, they will affect like suits in the future.

Id. More recently, this Court stated in an opinion involving the retroactivity of a provision of the Bankruptcy Reform Act of 1978 that:

> The principle that statutes operate only prospectively...is familiar to every law student....
>
> ***
>
> "The presumption is very strong that a statute was not meant to act retro-spectively, and it ought never to receive such a construction if it is susceptible of any other."

United States v. Security Industrial Bank, 459 U.S. 70, 79-80 (1982) (citations omitted). Nevertheless, Williams insists that Bradley should apply here.

Bradley involved an award of attorneys' fees in a school desegregation case. The statute that was applied retroactively concerned precisely that issue: the award of attorneys' fees in school desegregation cases. The statute merely provided a new remedy for acts that already had been

determined to have been unlawful when they were undertaken. Our case is different. The ADEA, if applied retroactively to Williams, makes unlawful an act that was lawful when done. Bradley, therefore, is easily distinguishable.

Williams argues that the Arizona Court of Appeals also misapplied United States v. Alabama, 362 U.S. 602 (1960), and relied instead on cases like Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975). Pet. at 45. He says that United States v. Alabama allowed a new substantive cause of action. This is not so. United States v. Alabama did not make unlawful an act that was lawful when undertaken. United States v. Alabama involved a change of law permitting the United States to bring a "pattern and practice" suit against a state for denying voting rights. The statutory change did not affect the state's substantive obligation not to deny the right to vote. It merely provided that the state, rather than only its officials, could be

made a formal party to the litigation. In addition, the United States already had filed an amended complaint naming the state. The case, in effect, allowed the amendment of the complaint. United States v. Alabama, therefore, does not stand for the proposition that an act that was lawful when undertaken can be made unlawful by retroactive application of a statute.

Williams' Complaint never alleged a claim under the ADEA. He is not seeking to have new legislation applied to give him new procedures or a new remedy[1] for already unlawful conduct. What he is seeking is a

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[1] An example of seeking a new remedy would be if Williams had been retired mandatorily at age 68 and he had filed a lawsuit under the ADEA, but turned 70 while the suit was pending. Assume that the court determined that the Board's decision to retire Williams at age 68 violated the ADEA as in effect when he was retired. Then assume that while the case was pending, the ADEA amendment was passed. Finally, assume that TUSD argued that, although it might be liable for back pay from age 68 to 70, it would not be liable for back pay after Williams reached age 70 and that it would not have to reinstate him. The ADEA amendment then might apply, and TUSD might have to reinstate him with full back pay. The issue would be one of remedy for an act that was unlawful when it was undertaken.

chance to try to persuade this Court to say that "even though TUSD did not act unlawfully when it acted, we will apply the ADEA amendment retroactively to say that it acted unlawfully." He also is arguing essentially that "even if I didn't allege a violation of ADEA in my complaint, and even though I never went through the procedures required before I could sue under ADEA, the Court should rule that TUSD violated the ADEA and should give me my job back." No case supports this kind of retroactive application.

Under the ADEA, no suit may be filed until sixty days after the employee has filed a charge with the Equal Employment Opportunity Commission ("EEOC") and the appropriate state agency (in deferral states). 29 U.S.C. §§ 626(d) and 633(b). The state agency in Arizona is the Arizona Civil Rights Division of the Attorney General's office ("ACRD"). Williams has never filed a charge with the EEOC, let alone within three hundred days of the

"challenged practice." See 29 U.S.C. § 626(d)(2). The limitations begin to run on the date when the decision concerning a challenged employment practice is made and communicated to the employee, not when it takes effect. Chardon v. Fernandez, 454 U.S. 6 (1981), aff'd, 462 U.S. 650 (1982). Filing such a charge is a condition precedent to bringing a civil action under ADEA. 29 U.S.C. § 626(d)(1) and (2). In addition, Williams never filed a charge with the ACRD, which also was required. Oscar Mayer Co. v. Evans, 441 U.S. 750 (1979). Finally, even assuming for purposes of this argument that TUSD's "violation" was "willful," Williams never filed suit under the ADEA, and the three-year statute of limitations has passed. 29 U.S.C. § 626(e).

Williams wants the substantive provisions of the ADEA retroactively applied to him, without also having the procedural provisions applied. If the ADEA applies to him, the entire ADEA, and not only its substantive provisions, must apply. Because

Williams has not met the procedural prerequisites to filing suit under the ADEA, and because he never brought suit under the ADEA, the ADEA does not apply. The Arizona Court of Appeals correctly ruled.

Williams argues that the Arizona Court of Appeals "avoided the full Bradley . . . test." Pet. at 44. Although the Arizona Court of Appeals may not have addressed the three-part Bradley test in quite the form that Williams would like, a step-by-step application of the test requires the same result as was reached by the Arizona Court of Appeals.

In determining whether legislation should be applied retroactively, the Court first looks to the language of the statute. If this does not provide a clear answer, the Court then must look to the legislative history. If this still does not provide a clear answer, the Court then must determine whether the retroactive application would result in a "manifest injustice." Bradley, supra, at 711 (1974).

Congress specifically provided that the amendment at issue here was to take effect on January 1, 1987. P.L. 99-592 § 7(a). One exception was set forth in § 7(b) which states that:

> Effect on existing causes of action. -- The Amendments made by Sections 3 and 4 of this Act shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987.

In enacting this exception to the effective date of the legislation, Congress intended to insure that the amendments would not destroy a cause of action already existing under the prior version of the ADEA. Section 7(b) does not mean that all other amendments to the ADEA would be retroactive, whether or not a plaintiff had an "existing cause of action" under the prior version of the ADEA. If anything, § 7(b) implies only that the other amendments might be retroactively applied in a case where a plaintiff did have an "existing" cause of action under the prior version of the ADEA. John Williams, of course, had no such

"existing cause of action" under the ADEA as in effect before January 1, 1987. He did not, and could not, have had such an "existing cause of action" arising under the ADEA before amendment, because before the amendment, ADEA did not apply to persons age 70 or older. Therefore, Congress should be taken at its word. The ADEA amendment became effective on January 1, 1987. Williams was mandatorily retired years prior to that. The ADEA amendment does not apply to him.

The legislative history provides some, although little, guidance. The one reference in the Congressional debate that touches on the retroactive application of the amendments was when Senator Moynihan stated:

> This bill will allow the 78,000 over 70 <u>who are still working</u> to continue to do so and it will permit the 177,000 Americans between 65-70, <u>who are still working</u> - but might have had to retire in the next 5 years to do so as well.

132 Cong. Rec. No. 143, part II, S16856 (Daily Ed. October 16, 1986) [emphasis

added]. John Williams was not "still working" when the amendments became effective.

If the wording of the statute and the legislative history are inconclusive on the issue of retroactivity, the question becomes whether or not retroactive application of the amendment would create a manifest injustice. This determination involves an analysis of (a) the nature and identity of the parties; (b) the nature of their rights; and (c) the nature of the impact of the change in law on those rights. Bradley, 416 U.S. at 717. Applying this analysis to Williams' situation leads to the conclusion that the ADEA amendments should not be applied retroactively.

As to the first factor, the nature and identity of the parties, the defendant in this case, as in Bradley, is a public school board. Merely because Williams was employed by a public rather than a private entity, however, should not mean that the first Bradley factor should weigh in his favor.

The Bradley Court specifically recognized the possibility that lawsuits involving public entities might, in some circumstances, be viewed as routine private litigation. 416 U.S. at 718. See also, Brooks v. United States, 757 F.2d 734, 743 (5th Cir. 1985) ("Although the suit here involves the United States, it acts much like a private party in the instant case."). Even though this case involves a public entity, it is actually no more than a garden-variety lawsuit between an employee and employer. See, Marshall v. Delaware River and Bay Authority, 471 F.Supp. 886, 891 (D.Del. 1979).

> It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retro-spective operation, affect the rights of parties. . .

The Schooner Peggy, 5 U.S. (1 Cranch) at 110.

If Williams had worked for a private employer, there would be almost no question

but that the amendment would not be applied retroactively. Unlike the statutes, treaty or regulations at issue in The Schooner Peggy, Thorpe, United States v. Alabama, or Bradley, the ADEA applies to most private as well as public employers. If the amendment is retroactive only for public, but not for private, employers, the result would be absurd -- for no rational reason, some people over age 70 would go back to work, while others would not. Thus, when analyzing "the nature of the parties," the Court should focus on the employer-employee relationship, and not on the fact that TUSD is a public entity.

The Court in Bradley next directed an inquiry as to the nature of the rights of the parties. 416 U.S. at 721. In Bradley, the Court emphasized that the school board had engaged in a conscious course of conduct with the knowledge that, under already existing theories, it could have been required to pay attorneys' fees. Id. Rather than creating a whole new area of

liability, the statutory amendment addressed in Bradley merely served to create an additional remedy, attorneys' fees, for a preexisting wrong. The Court also noted that permitting attorney fees would provide an incentive to institute legal actions to cure illegal conditions. In the instant case, there were no illegal conditions to be "cured."

TUSD did nothing unlawful when it decided not to continue Williams' employment beyond age 70. The rights and obligations of John Williams and TUSD were fixed and in place in 1983 when Williams' application for continued employment was denied. "In such circum-stances, post-Bradley cases have declined to apply new law to pending cases." Sikora v. American Can Co., 622 F.2d 1116, 1123 (3d Cir. 1980).

Finally, the Bradley Court looked to the nature of the impact of the change in law upon the rights of the parties. The Court noted that

> [n]o increased burden was imposed since [the attorneys' fees

> statute] did not alter the Board's constitutional responsibility for providing pupils with a non-discriminatory education. Also, there was no change in the substantive obligation of the parties.

416 U.S. at 721. In our case, unlike Bradley, the amendment to ADEA changed the substantive obligation of all employers covered by the ADEA. The amendment, therefore, should not be retroactively applied. See Marshall v. Delaware River and Bay Authority, supra, 471 F. Supp. at 891; see also, DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282, 1283 (5th Cir. 1986) (As Plaintiff's "dismissal occurred prior to the effective date of the curative amendment, [he] failed to state a claim upon which relief can be granted [under ADEA]."). Retroactive application of the ADEA amendment in this case would impose liability for an act lawful at the time it was done.

The case of United States v. Hill, 676 F.Supp. 1158 (N.D. Fla.), cited by Petitioner, does not help him. There, the Court applied certain statutory amendments retro-

actively. In doing so, however, the Court expressly noted that

> the amendments...do not prohibit something that was previously lawful.

Id. at 1170. In our case, however, the amendment does precisely that: it now generally prohibits mandatory retirement at any age, while the version of the statute in effect when John Williams was retired did not apply to persons age 70 or older. The Court, therefore, must "struggle hard against a construction which will, by a retrospective operation, affect the rights of the parties." The Schooner Peggy, 5 U.S. (1 Cranch) at 110.

Williams argues that the Arizona Court of Appeals, rather than applying the Bradley test, relied on cases like Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975). In Weise, a professor alleged a claim under Title VII and wanted an amendment retroactively applied to her. Prior to the amendment, employees of educational institutions were not covered by Title VII.

The Court refused to apply the amendment retroactively to create a new right where none previously existed. Id. at 411. Although the Court in Weise did not engage in a long discussion of the Bradley test, it did expressly find that retroactive application of the Title VII amendment would, in that case, be manifestly unjust, citing Bradley. Id. See also, Wolf v. J.I. Case Co., 617 F.Supp. 858 (E.D.Wis. 1985) (refusing to apply ADEA amendments retroactively to pre-amendment mandatory retirement). Here, as in Weise and Wolf, the legislation created new substantive rights and obligations. To apply the new legislation retroactively to invalidate an act that was lawful when done would be manifestly unjust. The Arizona Court of Appeals correctly decided the retroactivity issue. There is no reason for this Court to review that decision.

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. . . .

B. THE ARIZONA COURT OF APPEALS WAS CORRECT WHEN IT RULED THAT WILLIAMS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

Williams next says that the Arizona Court of Appeals misapplied this Court's due process rulings. Pet. at 52. TUSD never has argued that Williams did not have some sort of protectable liberty or property interest requiring due process. It gave him due process. There was a hearing. His attorney represented him. He called witnesses. He cross-examined witnesses. His lawyer made objections. Oral argument was afforded. Written argument was allowed. Williams says, however, that TUSD failed to give him proper notice. Pet. at 56.

Policy 4080 required Williams to show that his performance over the 24 months preceding retirement was superior; that his retirement would prove injurious to the welfare of students in general; that he would be difficult to replace. Williams says that these requirements were so "vague," he had no "notice" of what, "the policy required him to prove, and deprived

him of the ability to present meaningful evidence and an opportunity to be heard in a meaningful manner." Pet. at 57. This argument is ludicrous. In addition, and just as important, whether or not words such as "superior" or "difficult to re-place," when used in a school district employment policy that no longer exists, is not the kind of issue that warrants this Court's attention.

Policy 4080 applied to all employees of TUSD. It applied to the superintendent; it applied to principals; it applied to teachers; it applied to secretarial and custodial staff. Because of this, words such as "superior" cannot be defined with absolute precision in the Policy itself. This is the nature of language. Due process, however,

> "does not demand unobtainable feats of statutory clarity," United States v. Maude, 481 F.2d 1062, 1068 (D.C. Cir. 1973), and ...." absolute precision in drafting laws is not demanded," particularly where the law does not

> impose a criminal penalty. High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1229 (11th Cir. 1982).

Planned Parenthood of Central and Northern Arizona v. Arizona, 718 F.2d 938, 948 (9th Cir. 1983). As long as the words can be defined and fleshed out in the context in which they will be applied, due process is not violated.

Evidence was presented at the hearing on each of the requirements set forth in Policy 4080. For example, witnesses familiar with counseling testified as to what they thought the attributes of a "superior" counselor were. Administrators testified as to the attributes of a "superior" employee. Nothing prohibited Williams from attempting to refute their definitions. Nothing prohibited him from calling his own witnesses to testify about the attributes of a superior counselor or employee. Nothing prohibited him from then showing that he had those attributes. In fact, Williams did present evidence

concerning the attributes of a superior counselor. Merely because the TUSD Governing Board may not have agreed with his evidence, or decided that Williams did not have those attributes, does not render the Policy unconstitutionally vague. The same is true for the other two prongs of the test set out in Policy 4080. Williams was not denied due process. Policy 4080 was not unconstitutionally vague. The Arizona Court of Appeals correctly ruled.

CONCLUSION

For the reasons stated above, there is no issue in this case that warrants review by this Court. This Court should deny Williams' Petition for Writ of Certiorari.

DATED this 18th day of January, 1989.

DeCONCINI McDONALD BRAMMER
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By Denise M. Bainton

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CERTIFICATE OF SERVICE BY MAIL

I, DENISE M. BAINTON, attorney for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 18th, 1989, I served Respondents' Brief in Opposition to Petition for Writ of Certiorari by causing to be deposited three (3) copies thereof, enclosed in a sealed envelope with First Class postage thereon fully prepaid, at a United States Post Office mailbox in Tucson, Arizona, addressed as follows in accordance with Rule 28 of the Rules of the United States Supreme Court:

Catherine M. McCracken
BUSBY, McCRACKEN & BELL, P.C.
1241 East Prince Road
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Attorneys for Petitioner

and filed same causing to be deposited the original and forty (40) copies thereof, enclosed in a sealed box with First Class postage thereon fully prepaid, at a United States Post Office at Tucson, Arizona, addressed as follows in accordance with Rule

28 of the Rules of the Unites States Supreme Court:

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
Washington, D.C. 20543

DATED this 18 day of January, 1989.

DeCONCINI McDONALD BRAMMER
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SUBSCRIBED AND SWORN to before me this 18th day of January, 1989 by DENISE M. BAINTON.

Joan E. Reynolds
Notary Public

My Commission Expires:
January 10, 1992

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Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 88-1120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, a political subdivision of the State of Arizona; THOMAS J. CASTILLO, EVA BACAL, THOMAS WRIGHT, LAURA ALMQUIST, RAUL GRIJALVA, MERRILL GRANT, in their capacities as members of the School Board TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Arizona Court of Appeals erred in upholding the trial court's decision that the 1986 Amendment to the Age Discrimination in Employment Act (ADEA) removing the maximum age cap to the Act and abolishing mandatory retirement should not be given immediate effect to a case involving a school teacher and counselor who was involuntarily retired from his employment with school district when said retirement occurred prior to the passing of the Amendment but said Amendment became effective law prior to the issuance of the trial court's final judgment with regard to a multifaceted challenge including consitituion issues to the School District's method and procedure used forcing Petitioner's retirement.

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners JOHN W. WILLIAMS and WINIFRED WILLIAMS hereby submit the following reply brief addressing those issues first raised in the Brief in Opposition filed by Respondent's TUCSON UNIFIED SCHOOL DISTRICT NO. 1 of PIMA COUNTY and the members of its governing board and its superintendent (herein after collectively "TUSD")

ARGUMENT

THE ARIZONA COURT OF APPEALS INCORRECTLY REFUSED TO APPLY THE 1986 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT RETROSPECTIVELY TO AN ACTION PENDING APPEAL AT THE TIME SAID AMENDMENTS BECAME EFFECTIVE

A. WILLIAMS' action against TUSD was pending within the definition set forth in applicable case law at the time the 1986 amendments to the Age Discrimination in Employment Act became effective.

In opposing WILLIAMS' petition for Certiorari, TUSD has claimed that WILLIAMS' action was not "pending" at the time the 1986 Amendments to the Age Discrimination in Employment became effective, and as such the amendment should not be given effect to WILLIAMS' case as required by this court's

decision in Bradley v. Richmond School Board. 416 U.S. 696 (1974).

U.S. v. Schooner Peggy. 5 U.S. 103 (1801). established the general rule favoring immediate application of new legislation to cases pending appeal. Instead of using the term "pending case" when describing the situations in which to apply the rule. Justice Marshall referred to a period "subsequent to judgment and before the decision of an appellate court." The status of WILLIAMS' case was "subsequent to judgment and before the decision of an appellate court." His case represents precisely the circumstances described in Schooner Peggy. 5 U.S. 103.

Bradley v. Richmond School Board. 416 U.S. 696 (1974). confirms that WILLIAMS is entitled to immediate application of the 1986 Amendment to the ADEA. The basis of the Bradley. 416 U.S. 696 holding is that "a court is to apply the law in effect at the time it renders its decision." Id., at 711. The 1986

Amendment became effective just prior to WILLIAMS filing his Motion for Reconsideration to the Superior Court of Pima County in the State of Arizona. The law as amended makes it illegal to mandatorily retire any person based solely on age. In accordance with Bradley, 416 U.S. 696, the Appellate Court should have applied the law as it existed at the time it rendered its decision in WILLIAMS' case.

TUSD argues that the situation at bar is distinguishable from Schooner Peggy, 5 U.S. 103; Bradley, 416 U.S. 696; Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); and United States v. Alabama, 362 U.S. 602 (1960). Those cases are not distinguishable and serve as appropriate precedent requiring immediate application of the 1986 Amendment.

Schooner Peggy, 5 U.S. 103 involved the condemnation of a French vessel. The U.S. Supreme Court applied a convention with France that regulated the condemnation of French

vessels which was consummated subsequent to the lower courts condemnation proceeding. TUSD distinguishes Schooner Peggy. U.S. 103 by stating that the ship had not yet been "definitely" condemned at the time the convention became effective and therefore is distinguishable from the case at bar. In fact, the ship had been condemned by the lower court proceedings. The reason it hadn't been "definitely" condemned was that the condemnation had been appealed. Id., at 108 and 109. WILLIAMS has been mandatorily retired but is presently appealing said retirement. The situation is precisely that before the Court in Schooner Peggy. 5 U.S. 103.

Thorpe. 393 U.S. 268 involved an eviction of a tenant in federally funded housing. After an order had been issued to have the tenant removed from an apartment, a circular was issued providing new procedural requirements for summary eviction. While it

is true that the tenant was a resident while her case was pending appeal, she was subject to an active order for eviction. Her situation was substantially analogous to WILLIAMS.

TUSD in their opposition admits an inconsistency in the court's application of the Bradley, 416 U.S. 696, principle and for that very reason this court should grant the Petition for Certiorari and hear the present case.

B. The procedural requirements of the ADEA are not jurisdictional in nature and should not be allowed to bar WILLIAMS recovery.

TUSD also alleges that WILLIAMS should be barred the benefit of retrospective application of the 1986 Amendment to ADEA because he did not follow the procedural requirements set forth in the act.

The procedural requirements to a claim under the Age Discrimation in Employment Act (ADEA), 29 U.S.C. § 621, et seq. are not

jurisdictional in nature and are, therefore, subject to waiver, estoppel and equitable tolling. Kennedy v. Whitehurst, 690 F.2d 951 (1982); Wright v. State of Tenn., C.A. 628 F.2d 949 (1980). The ADEA Amendment was not in effect at the time the violation by TUSD occurred. It would not be equitable to enforce procedural requirements that might bar WILLIAMS' recovery. If the remedy had been available at the time of the discrimination, WILLIAMS would have filed the necessary charges. The reason he did not was not due to untimeliness, but instead due to the inapplicability of filing said charges. Equity demands a waiver of any requirement not fulfilled due to the circumstances surrounding the appeal. The Amendment did not become effective until January 1, 1987. The case at bar has been under way since January 10, 1984. WILLIAMS' claim cannot be barred for failure to exhaust administrative remedies that were not extant at the time he initially sought

relief from the Court.

Bunch v. U.S., 548 F.2d 336 (9th Cir. 1977), in which a federal employee was denied employment because of age, dealt with provisions that exempted Federal employees from the protection of the ADEA. While the case was pending, amendments were passed extending the protection of the ADEA to federal employees. The Court, following the analysis set out in Bradley v. Richmond School Board, 416 U.S. 696 (1974), found that the amendment should be given immediate application in favor of the Plaintiff in accordance with the ADEA. The government had raised the defense that the Plaintiff should be barred from recovery for failure to comply with the ADEA procedural prerequisites. The Court found a claim could not be barred for failure to exhaust administrative remedies that were nonexistent at the time relief was sought from the Court. Bunch, 548 F.2d 336 at 340. The situation before the Court is the

same as presented in Bunch. 548 F.2d 336. The procedural requirements of the ADEA should be waived and not allowed to bar recovery.

C. Statutory direction favoring Retrospective application of the 1986 amendments to the Age Discrimination in Employment Act should not be limited so to bar WILLIAMS the benefit of said retrospective application.

Section 7 of the amended ADEA reads in relevant part as follows:

> "a) Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on January 1, 1987, except that with respect to any employee who is subject to a collective bargaining agreement:
> . . .
>
> b) The amendments made by Section 3 and 4 of this Act shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987."

Sections 3 and 4 of the ADEA deal with Law Enforcement officer and firefighters. only, where Congress expressly limited retroactive application. The specific direction to such a defined area serves as evidence that Congress took affirmative action

in the areas to be limited to prospective application, leaving the inference that immediate application was intended to all areas not involving Law Enforcement officers and firefighters.

The purpose in limiting the immediate application of Sections 3 and 4 through §7(b) was to ensure that the Amendments to ADEA would not serve to destroy an already existing cause of action in effect prior to January 1, 1989. The language used is very specific and contains no mention of an intent to limit the entire act. Sections 3 and 4 are the only sections that might serve to destroy and already existing cause of action through immediate application. If a limitation on the entire act were intended, more general language could have been used limiting the application of the entire Amendment. Upon analysis, the only explanation for Congress being specific in its limitation, is that it intended immediate application to the

Amendment subject to the specific exceptions set out. TUSD tries to limit the implied retroactive application to those cases in which there was an "existing cause of action" arising under ADEA in effect before January 1, 1987. The flaw with its analysis is that none of those situations referenced by TUSD exist. Under TUSD's proposal, the only existing causes of action that would be appropriate for immediate application are those specifically restricted by the language in Section 7(b) of the ADEA; therefore, there would be no instance where immediate application would be available. There is a legislative directive of immediate application of the Amendment in cases such as WILLIAMS.

D. Granting WILLIAMS immediate application of the 1986 amendment to the ADEA would not result in manifest injustice.

In determining whether legislation should be given immediate application, a step-by-step approach is used. The Court first looks to the language of the statute. In this

instance, statutory direction requires immediate application of the ADEA. However, if the Court does not accept this direction, it then looks to whether the immediate application would result in a "manifest injustice." Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). The first analysis goes to the nature and identity of the parties. TUSD asserts that even though it is not a private party as defined in Bradley, 416 U.S. 696, it should be treated as one for the purposes of this case. Upon analysis of the parties and their relationship, TUSD must be defined as a public entity. Bradley, 416 U.S. 696 recognized the need to categorize a school board as a public entity. Discriminatory action taken by a government-funded entity is an area of great national concern. Application of the rules set out in United States v. Schooner Peggy, 5 U.S. 103 (1801), and Bradley, 416 U.S. 696, requires immediate application of the 1986 Amendment to

the ADEA after analysis of the first prong.

TUSD focuses on what it sees as an inconsistency in directing immediate application of the ADEA to public entities as opposed to private. Bradley, 416 U.S. 696 addressed this issue in pointing out that public entities (in the case of Bradley, 416 U.S. 696, a School Board), should be held to stricter compliance with constitutional or, as in the present case, legislative mandate.

Federal Courts - Manifest Injustice Exception - Used to Deny Retroactive Application of the 1978 Amendments to the Age Discrimination in Employment Act (ADEA), 26 Vill L. Rev. 705 (1980-81) as cited by TUSD, addresses the inconsistency brought up by TUSD. It reasons that the Court in Sikora v. American Can Co., 622 F.2d 1116 (3rd Cir. 1980), placed too much emphasis on the status of the parties as private entities. It argues that the Court should have recognized the issue as being of great national concern

and profound national importance and required the Act's immediate application to both private and public entities. Admittedly, this is probably the better approach; but in either case, WILLIAMS passes the "parties" analysis favoring immediate application of the Amendment.

The second analysis is the nature of the rights of the parties with focus on whether the rights are vested and matured. TUSD was required by statute to provide WILLIAMS an opportunity to continue his employment. (See A.R.S. § 38-781.36). TUSD had not developed a plan until after WILLIAMS applied for his continuation. The rights of the parties under this plan could not be deemed vested, when the plan's very existence was in response to the situation at bar. The right that had vested was WILLIAMS' right to apply for continued employment under statute. The rules and standards used to deny his application were reactionary and cannot be deemed vested by

TUSD testing it on WILLIAMS. The rights of the parties had not yet vested and matured so as to find "manifest injustice" as referenced in Bradley.

McCarthy's article, points out another reason that the rights of the parties had not vested. Judge Adams, in his dissenting opinion in Sikora v. American Can Co., 622 F.2d 1116 (3rd Cir. 1980), found that the rights of the parties in that case could not be vested or matured absent a ruling by the Supreme Court or the District Court with jurisdiction vesting said rights. The law review article references this language and supports its logic in favor of immediate application. The 1986 Amendment has not conclusively been interpreted by the Courts; as such, the rights thereunder have not vested or matured.

The "nature of the rights" analysis involves the nature of the impact the change in the law has upon the rights of the parties.

The obvious impact on the parties is that WILLIAMS will have his job restored. TUSD states that it is unfair to impose liability for its discriminatory actions that were "lawful" when taken. Any time a law has retroactive effect, it has impact on action previously taken. The purpose in it being retroactive is to correct past wrongs. TUSD has not set forth the actual effect the return of WILLIAMS will have on its operations; as such, no adverse effect must exist. Any inconvenience to TUSD is minimal compared to the right preserved in favor of WILLIAMS, that being the right not to be discriminated against in the work force merely because of age.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 7th day of February 1989.

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CERTIFICATE OF SERVICE

I, CATHERINE M. McCRACKEN, attorney for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1989, as per the direction of the Clerk of the Supreme Court, served copies of the foregoing Reply Brief in Support of Petition for Writ of Certiorari on the parties hereto as follows:

On the Respondent TUCSON UNIFIED SCHOOL DISTRICT by hand delivering three (3) copies of it to its attorney of record:

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